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Judgment, Identity, and Independence

CASSANDRA BURKE ROBERTSON

Whenever a new corporate or governmental scandal erupts, onlookers ask, “Where were the lawyers?” Why would attorneys not have advised their clients of the risks posed by conduct that, from an outsider’s perspective, appears indefensible? When numerous red flags have gone unheeded, people often conclude that the lawyers’ failure to sound the alarm must be caused by greed, incompetence, or both. A few scholars have suggested that unconscious cognitive bias may better explain such lapses in judgment, but they have not explained why particular situations are more likely than others to encourage such bias. This Article seeks to fill that gap. Drawing on research from behavioral and social psychology, it suggests that lawyers’ apparent lapses in judgment may be caused by cognitive biases arising from partisan kinship between lawyer and client. The Article uses identity theory to distinguish particular situations in which attorney judgment is likely to be compromised, and it recommends strategies to enhance attorney independence and minimize judgment errors.

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Judgment, Identity, and Independence

CASSANDRA BURKE ROBERTSON*

I. INTRODUCTION: “WHERE WERE THE LAWYERS?”

Whenever corporate and governmental scandals erupt, onlookers are quick to ask, “Where were the lawyers?”¹ From the savings and loan failures of the 1980s, through Enron’s collapse, Hewlett-Packard’s pretexting operation,² the repudiated interrogation memos from the Office of Legal Counsel,³ and countless less-publicized mishaps and failures, courts and commentators have questioned why on Earth the high-level attorneys involved in each case did not steer their clients to safer legal ground.

Onlookers often conclude that, because the detrimental legal consequences of the clients’ decisions were so clear, the lawyers involved must have been complicit in client wrongdoing. Professor Donald Langevoort coined the term “venality hypothesis,” to describe this phenomenon, and others have similarly adopted the phrase.⁴ The venality hypothesis has been proffered as an explanation for nearly every legal scandal, as people assume that the lawyers were greedy, willfully

* Assistant Professor, Case Western Reserve University School of Law. For their thoughtful comments on earlier drafts, I thank Jonathan Adler, Peter J. Burke, Kathleen Clark, Jonathan Entin, Peter Gerhart, Raymond Ku, Robert Lawry, Jacqueline Lipton, Christopher Lund, Lynn M. Mather, Kevin McMunigal, Jane Moriarty, Thomas Robertson, Jan E. Stets, and Wendy Wagner. Earlier versions of this Article were presented at the Ohio Legal Scholars Workshop and the 2009 Law and Society Annual Meeting. I also thank Case Western Reserve University School of Law for supporting this project with summer research funding, and I thank the members of the *Connecticut Law Review* for their helpful editing and advice.

¹ See, e.g., *Lincoln Sav. & Loan Ass’n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (“Where were these professionals . . . when these clearly improper transactions were being consummated? . . . What is difficult to understand is that with all the professional talent involved . . . why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.”).

² See *Hewlett-Packard’s Pretexting Scandal: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 13 (2006) (including questions from a Congress member: “[W]here were the lawyers? The red flags were waving all over the place,” but “none of the lawyers stepped up to their responsibilities.”).

³ See *infra* Part IV.

⁴ Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75, 77–78 (1993) (“To pose the question of attorney motivation is to invite a prompt answer from many people: greed and moral corruption, of course. Lawyers know of their clients’ misdeeds, or at best deliberately close their eyes to the evidence, simply to preserve their wealth, status and power.”). See, e.g., Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 991 (2005).

incompetent, or too weak to resist client pressure.⁵ Federal Judge William G. Young clearly articulated the venality hypothesis in a recent pharmacy antitrust case.⁶ After concluding that the defendants had clearly colluded to inhibit competition, he asked, “Where were the lawyers here?”⁷ He pointed out that the defendants included one of Massachusetts’s foremost pharmacy chains and one of its leading HMOs and stated that “[s]urely lawyers must have been in on this deal at its inception. Yet no fair-minded lawyer . . . could have countenanced [the client’s action] and thought they were doing aught but attempting an end run around the law.”⁸ He queried whether there was “no lawyer on either side who cautioned against this rather blatant attempt to frustrate the legislative will,” and concluded that “[t]here should have been. The conduct of the lawyers who vetted this deal was ‘too slick by half.’”⁹

The key assumption in the venality hypothesis—that because the legal pitfalls of a decision are so obvious, a lawyer’s failure to caution against the client’s action must amount to complicity or weakness in the face of pressure—runs through other cases as well. One lawyer’s conduct in the fall of the BCCI bank has been described as “almost forc[ing] the observer who reviews the evidence in retrospect to conclude that he was either stupid or venal,” and noting that “[h]is career up to this point rules out stupidity.”¹⁰ In gentler terms, Jack Goldsmith, the former head of the Office of Legal Counsel framed a similar argument about John Yoo, the lawyer who drafted subsequently withdrawn memoranda defining torture in detainee interrogation. Because Yoo possessed great “knowledge, intelligence and energy” but nonetheless drafted “very important opinions” of extremely “poor quality,” Goldsmith concluded that the errant legal conclusions were likely due, in part, to the attorney’s succumbing to “pressure from the White House”—and not merely to mistake or incompetence.¹¹

While this theme is common, it is not a universal explanation for attorneys’ failure to warn of seemingly obvious legal pitfalls. Close analysis of the events leading up to recent scandals fails to support the narrative of professional misconduct. Yoo, for example, denied the

⁵ See Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 BUS. LAW. 317, 344 (2007) (“[E]very major financial scandal is attended by cries of, ‘Where were the accountants? Where were the lawyers?’”).

⁶ *J.E. Pierce Apothecary, Inc. v. Harvard Pilgrim Health Care, Inc.*, 365 F. Supp. 2d 119, 150 n.16 (D. Mass. 2005).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (quoting *Fed. Refinance Co. v. Klock*, 229 F. Supp. 2d 26, 29 n.2 (D. Mass. 2002), *rev’d on other grounds*, 352 F.3d 16 (1st Cir. 2003)).

¹⁰ Langevoort, *supra* note 4, at 77–78.

¹¹ Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG., Sept. 9, 2007, at 40.

existence of White House pressure and vehemently defended his work on the interrogation opinions.¹² Many of Enron's problems were later traced to "a series of unconsciously biased judgments rather than a deliberate program of criminality."¹³ Of course, such defenses do not prove the absence of wrongdoing, and this Article does not rule out conscious self-interest as an explanation for many instances of bad legal advice. But in those cases where there is no evidence of external pressure, greed, or incompetence, it suggests that a more nuanced examination of attorney judgment is necessary.

Inspired by work in the cognitive and behavioral sciences, a few scholars are beginning to argue that "unconsciously biased judgments" are at issue in recent scandals and to challenge the notion that such failure necessarily results from either venality or stupidity.¹⁴ According to these scholars, lawyers' lapses in judgment—even severe lapses—may be unconscious and innocent of venal motive, caused instead by cognitive biases that lead to a "diminished capacity to perceive danger signals."¹⁵

But innocent failures are by no means benign. Regardless of whether bad legal advice is caused by innocent cognitive bias or by venal wrongdoing, it results in the same costs and consequences to the client. Furthermore, cognitive failures are even more difficult to recognize and avoid than are conscious misdeeds,¹⁶ thus creating additional difficulties for the client.

So far, the legal literature has not fully explored the factors that promote such judgment-affecting cognitive bias. This Article seeks to begin filling that gap. Drawing on identity theory from social psychology, it develops an explanatory hypothesis for why certain situations may prompt lawyers to deviate from a neutral perspective more often than others and how that lack of neutrality prevents the lawyers from offering fully independent advice to their clients. It focuses on situations in which there is no direct financial incentive or other external incentive to explain lawyers' biased judgment, with particular attention to governmental and in-house corporate attorneys who have no direct financial stake in their clients' cases.

Part II of this Article examines some of the most common cognitive biases affecting partisans generally. Part III offers background in identity theory, analyzes recent research on lawyer identity and decision making,

¹² *Id.*

¹³ Max H. Bazerman et al., *Why Good Accountants Do Bad Audits*, 80 HARV. BUS. REV. 96, 97 (2002).

¹⁴ See Langevoort, *supra* note 4, at 95; see also Bazerman et al., *supra* note 13, at 97.

¹⁵ Langevoort, *supra* note 4, at 95.

¹⁶ See HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* 96 (1983) ("Most of the bias that arises . . . cannot be described correctly as rooted in dishonesty—which perhaps makes it more insidious than if it were.").

and applies identity theory to explain why lawyers in certain situations may be particularly vulnerable to the cognitive biases outlined in Part II. Part IV ties cognition, judgment, and identity together in a case study of government-attorney decision making in the Office of Legal Counsel. Finally, Part V identifies two situations in which there is a particularly high risk of cognitive bias: first, situations in which the attorney performs a policy making or managerial role in the client's organization, and second, where the attorney is motivated by a deep commitment to, and identification with, a social cause beyond the case itself. Part V concludes by offering recommendations for optimizing the independence of legal advice in the face of powerful cognitive challenges.

II. PARTISANSHIP, ROLES, AND PERCEPTUAL FILTERS

The *Model Rules of Professional Conduct* provide that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”¹⁷ Maintaining such independence and neutrality may be easier said than done. Lawyers are never completely independent of their clients, and the stronger their partisan¹⁸ affiliation with their clients or with a related social cause, the greater the risk that they will lack an independent perspective.¹⁹ The partisan bias that arises from such affiliation may be viewed as a subtype of what has been referred to as “cultural cognition”—the “psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation.”²⁰

This section discusses how partisan bias can affect both the extent to which lawyers notice or attend to relevant issues and the interpretation they give to those issues. Both attention and interpretation are essential to decision making, and yet, as this section discusses, both are subject to the possibility of bias.²¹ Noticing information “picks up major events and gross trends,” while interpretation or “sensemaking,” by contrast, “focuses

¹⁷ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007). Independence and neutrality may also be elements of a lawyer's duty of competence, as competence requires “analysis of the factual and legal elements of the problem.” *Id.* at R. 1.1 & cmt. 5 (2007).

¹⁸ The term “partisan” is used in its broadest sense of allegiance to a client and does not to refer political partisanship.

¹⁹ See *infra* Part IV (discussing partisanship in context of torture memo controversy).

²⁰ Dan M. Kahan & Donald Braman, *Cultural Cognition of Public Policy*, 24 YALE J. L. & PUB. POLICY 149, 152 (2006). For purposes of this Article, I do not consider whether cognitive biases and bounded rationality in general are epistemically distinct from cultural cognition; both frameworks appear helpful for understanding the sources and effects of partisan bias, and neither is inconsistent with an identity-theory approach to analyzing such bias. See Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1123–24 (2006) (book review) (noting controversy over whether “cultural cognition” was different from, or a part of, bounded rationality).

²¹ William H. Starbuck & Frances J. Milliken, *Executives' Perceptual Filters: What They Notice and How They Make Sense*, in THE EXECUTIVE EFFECT 35, 60 (Donald C. Hambrick ed., 1988).

on subtleties and interdependencies.”²² If information is tuned out or not noticed, of course, then it is not available to be integrated into the lawyer’s interpretation of the situation at hand.²³

A. *Selective Attention, Noticing, and Recall*

All human beings filter information. People cannot pay equal attention to everything in their environment—to do so would mean, for example, that a person would hear “background noise as loudly as voice or music” and would be unable to enjoy a symphony or to focus on partners in a conversation.²⁴ As a result, people must engage in perceptual filtering in order to distinguish between relevant and irrelevant information, attending more to information they find relevant than to information they perceive as irrelevant.²⁵ For example, witnesses to a crime are typically better able to recall the characteristics of the weapon used than the characteristics of the perpetrator behind the weapon, as the weapon presents an immediate threat that draws the witness’s focus.²⁶

While filtering is necessary, it can introduce cognitive bias, as people’s filters more often flag information favorable to preexisting beliefs or desires as “relevant.”²⁷ More than half a century ago, a pair of social scientists documented the influence of partisanship on perception.²⁸ They showed undergraduate students from Dartmouth and Princeton a film of a rowdy football game between the two schools. Both teams had been repeatedly penalized for rule infractions, Princeton’s star player exited during the second quarter with a broken nose, and a Dartmouth player suffered a broken leg. The researchers who showed the film asked students to count the number of rule infractions by each team, to rate those infractions as “flagrant” or “mild,” and to determine which team started the “rough play.”²⁹

The Princeton students reached very different conclusions than the Dartmouth students. They viewed the “facts” of the game differently,

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 40; see also SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 21 (1993) (“Perceptions are, by their very nature, selective.”).

²⁵ Starbuck & Milliken, *supra* note 21, at 41.

²⁶ Fredrik H. Leinfelt, *Descriptive Eyewitness Testimony: The Influence of Emotionality, Racial Identification, Question Style, and Selective Perception*, 29 CRIM. JUST. REV. 317, 322 (2004).

²⁷ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129 (1954); see also Starbuck & Milliken, *supra* note 21, at 40. As well as introducing bias, selective perception can also build on people’s preexisting biases; research has shown both that eyewitnesses are better able to remember faces of people from their own racial group than from distinctly different groups, and that they rated criminal acts as being more culpable when the perpetrator is ethnically dissimilar to themselves. Leinfelt, *supra* note 26, at 321.

²⁸ Hastorf & Cantril, *supra* note 27, at 129–30.

²⁹ *Id.* at 130.

paying selective attention to the facts favorable to their team. The Princeton students recorded twice as many Dartmouth rule infractions as Princeton ones and judged the Dartmouth rule infractions to be more often flagrant than Princeton's infractions.³⁰ Eighty-six percent of Princeton students believed that the Dartmouth team started the rough play.³¹ By contrast, the Dartmouth students recorded nearly equal numbers of rule infractions between the two teams and believed that fewer of their team's infractions were "flagrant."³² Nor did they agree that their team had started the rough play—a majority (fifty-three percent) of the Dartmouth students stated that both teams started the rough play.³³

Selective attention carries over into the legal and business spheres.³⁴ In one study, researchers gave participants a file of information about a negligence lawsuit and assigned them the role of either the motorcyclist plaintiff or the car-driving defendant.³⁵ The participants were paired up, asked to attempt to reach a fair settlement, and told that the judge would impose a significant penalty if they failed to reach a settlement.³⁶ Participants were also asked to predict the judge's award and to recall arguments in favor of both sides.³⁷ In spite of the fact that both sides received identical information, participants' predictions of the judges' awards varied by role—those representing the plaintiff predicted awards \$14,537 higher than the awards predicted by those representing the defendant.³⁸ Both sides, when asked to list the arguments made in the case, were more likely to recall arguments in their favor.³⁹ Similar effects have been reported in studies of other professionals.⁴⁰

³⁰ *Id.* at 131–32.

³¹ *Id.* at 131.

³² *Id.* at 131–32.

³³ *Id.* at 131. By way of comparison, "[t]he official statistics of the game, which Princeton won, showed that Dartmouth was penalized 70 yards, Princeton 25, not counting more than a few plays in which both sides were penalized." *Id.* at 129.

³⁴ Behavioral economists often describe a professional's tendency to selectively attend to favorable information as a species of "self-serving bias." See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1093 (2000). This Article prefers to use the term "partisan bias" to encompass situations in which the actor (here, usually the lawyer) may not personally benefit, but an associated affiliate (here, usually the client) will. See Leigh Thompson, "They Saw a Negotiation": *Partisanship and Involvement*, 68 J. PERSONALITY & SOC. PSYCHOL. 839, 840–41 (1995) (noting that partisan observers may be induced to find support for a particular outcome).

³⁵ George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 145 (1993).

³⁶ *Id.* at 145–46.

³⁷ *Id.*

³⁸ *Id.* at 150.

³⁹ *Id.* at 150–51 (noting that the plaintiffs recalled an average of 1.04 more arguments favoring themselves, while the defendants recalled an average of 2.79 more arguments favoring themselves).

⁴⁰ See Don A. Moore et al., *Auditor Independence, Conflict of Interest, and the Unconscious Intrusion of Bias*, available at <https://littlehurt.gsia.cmu.edu/gsiadoc/wp/2002-19.pdf> (accountants).

Such variation in the prediction of litigation outcomes is likely to affect the advice lawyers provide to their clients. If the plaintiff's lawyer values the claim higher than a neutral decision maker (such as judge or jury) would actually award, then the lawyer would likely offer misleading and unhelpful settlement advice to the client. Likewise, a defense attorney who undervalues the plaintiff's likely recovery would similarly offer misleading advice. In both cases, the partisan bias compromises the attorney's ability to offer competent and truly independent advice. And in both cases, the client is likely to end up disappointed in the lawyer when the actual outcome is less favorable than the attorney had advised.

B. *Selective Interpretation*

While selective attention describes what facts are noticed, attended to, and ultimately recalled, selective interpretation describes how those facts are evaluated. Again, people's roles and allegiances influence their interpretations of an event. In the football game study, for example, students from the two schools employed selective interpretation in evaluating the motives and accusations surrounding the game.⁴¹ A majority of Dartmouth students believed that Princeton was alleging that "Dartmouth tried to get [Princeton's star player]" and that Dartmouth played "intentionally dirty."⁴² Only ten percent of Dartmouth students believed these allegations were actually true, whereas fifty-five percent of Princeton students believed them.⁴³ Students also differed as to why they thought the charges were being made: Dartmouth students were more likely to believe that the charges were made because Princeton's star player had been injured, while Princeton students were more likely to believe that the charges were made to prevent repetition of such a rough game.⁴⁴ Thus, the different allegiances led to very different interpretations of the controversy surrounding the game.

Selective interpretation can produce unintended consequences, as shown by a study involving perceptions of Archie Bunker in the 1970s television sitcom *All in the Family*. Bunker was an exaggeratedly bigoted character; his actions on the show were intended by the producer to reduce prejudice "by bringing bigotry out into the open and showing it to be illogical."⁴⁵ Producers believed that the show satirized bigotry by portraying Archie Bunker as a "fool," and others agreed: the show won an

⁴¹ Hastorf & Cantril, *supra* note 27, at 130–32.

⁴² *Id.* at 131.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ WERNER J. SEVERIN & JAMES W. TANKARD, JR., *COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA* 80 (4th ed. 1997).

award in 1972 from the NAACP.⁴⁶ However, when Neil Vidmar and Milton Rokeach conducted a study of viewers in 1974, it became clear that audience members interpreted the show in vastly different ways.⁴⁷ Viewers who were themselves high in prejudice did not perceive that Archie was being made fun of; instead, they were more likely to report that one or more of the non-prejudiced characters on the show were more often the target of the sitcom's humor.⁴⁸ When asked who "won" or who "lost" on a particular show, those low in prejudice would pick Archie as the loser, while those high in prejudice would pick one of the other characters.⁴⁹ Thus, only those already low in prejudice were likely to pick up on the show's message of the illogicality of prejudice; those with preexisting bias were likely to have their biases reinforced by the show.⁵⁰

Selective interpretation could similarly affect a lawyer's judgment about a case. A plaintiff's lawyer predisposed to sympathize with an injured client may interpret ambiguous medical records as providing greater support for her client's claim of injury, while a defense attorney, predisposed to be skeptical of the claim, may interpret those same records less generously. In addition, lawyers on both sides may find their clients' explanations of the situation more credible than a neutral observer would find them to be. As with selective attention, selective interpretation is likely to foster a belief that a client's case is stronger than it actually is. To the extent that this belief is communicated to the client, the client may end up quite disappointed when the outcome of the case is less favorable than the attorney had predicted.

C. *Bias Blind Spot*

Because individuals are not consciously aware of how cognitive biases affect their perception, the biases cannot always be put aside even when people make a concerted effort to maintain a neutral viewpoint. For example, when study participants made efforts to view the football game neutrally in order to participate in the study, their allegiance still influenced—albeit unconsciously—their view of the game. One Dartmouth alumnus who viewed a film of the game had heard from a Princeton alumni group about the many rule infractions committed by Dartmouth players.⁵¹ When the Dartmouth alumnus was unable to perceive the same infractions that the Princeton alumni had told him about,

⁴⁶ *Id.*

⁴⁷ *Id.* (citing Neil Vidmar & Milton Rokeach, *Archie Bunker's Bigotry: A Study in Selective Perception and Exposure*, 24 J. COM. 36, 40 (1974)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Hastorf & Cantril, *supra* note 27, at 132.

he assumed that the problem was an incomplete film, not a difference of perception.⁵² He sent a telegram to the researchers: “Preview of Princeton movies indicates considerable cutting of important part please wire explanation and possibly air mail missing part before showing scheduled for January 25 we have splicing equipment.”⁵³

Even when people understand the existence of cognitive biases on a theoretical level, they still tend to believe that their own judgment remains unaffected. Researchers have been able to manipulate a “liking bias” by asking subjects to evaluate a hypothetical roommate conflict involving characters who were similar or dissimilar to the study participants—for example, one character was described as a student who was “from Alabama, liked country . . . music, and enjoyed sharing her religious views with others.”⁵⁴ Subjects were asked how much they liked each character, how fair they felt they were being in mediating the conflict, and to what extent they believed they were biased.⁵⁵

The researchers concluded that the “liking bias” unconsciously influenced participants’ responses.⁵⁶ Although the study participants believed that they were being fair and making decisions based on the evidence, not on their preferences, their decisions did in fact differ based on characters’ described traits. Furthermore, study participants remained unaware of the effect of this situational bias even when the study “rather blatant[ly]” introduced background material on the characters, making study participants aware of factors such as religious preferences, music preferences, and other background information.⁵⁷ Thus, the researchers concluded that “[e]ven though the information causing the preference [i.e., background material regarding music preferences, religious views, etc.] was consciously perceived, the effects of this information on conflict perceptions were not.”⁵⁸

D. *Effects of Partisan Bias*

The effects of partisan affiliation, selective perception, and selective interpretation can combine to cause people to experience the same events in vastly different ways. They create individual realities that may not match those of others: “We can watch a football game, a person eating a hamburger, or a couple arguing as if these are ‘things’ that are ‘out there’

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 161 (2006).

⁵⁵ *Id.*

⁵⁶ *Id.* at 162.

⁵⁷ *Id.* at 163.

⁵⁸ *Id.*

to be viewed in one way; and yet what we ‘see’ is significantly determined by influences beyond our conscious purview.”⁵⁹ Similarly, it is not that Princeton and Dartmouth students merely had different attitudes about the same game—instead, to them, there were two very different games. Researchers in the football study concluded therefore “there is no such ‘thing’ as a ‘game’ existing ‘out there’ in its own right which people merely ‘observe.’”⁶⁰ “The game ‘exists’ for a person and is experienced by him only in so far as certain happenings have significances in terms of his purpose.”⁶¹

Lawyers are subject to the same cognitive processes that affect others. The resulting viewpoint can be considered both a “partisan” bias that is based on an affiliation with the client or a litigation-related social cause, and a “self-serving” bias, as the lawyer benefits from the client’s success.⁶² This Article focuses on those situations in which there is no obvious external benefit to the lawyer. It concludes that, in certain circumstances, lawyers develop a partisan affiliation with a client or with a social cause connected to the client, and it argues that this affiliation may very well lead attorneys to unconsciously perceive the world favorably to their clients. Thus, while outsiders may see red flags and may believe that no “fair minded lawyer . . . could have countenanced” the client’s action,⁶³ the lawyer may have a very different view of reality.

III. IDENTITY THEORY

As discussed in the prior section, partisan affiliation can lead to systematic cognitive biases. Accordingly, biases arising from the partisan nature of the lawyer-client relationship can cloud and distort attorney judgment. Simulations of settlement negotiations suggest that these biases regularly affect legal judgment.⁶⁴ The resulting failures in legal judgment differ from case to case, however. Until now, little attention has been paid to the question of what particular conditions or situational influences are likely to trigger such biases. This Article suggests that recent research on identity theory may shed some light on the conditions likely to predispose attorneys to such cognitive biases and errors in judgment.

Identity theory, first articulated in 1966,⁶⁵ focuses on the relationship

⁵⁹ Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 518–19 (2008).

⁶⁰ Hastorf & Cantril, *supra* note 27, at 133.

⁶¹ *Id.*

⁶² See Thompson, *supra* note 34, at 839; Loewenstein et al., *supra* note 35, at 140–41.

⁶³ J.E. Pierce Apothecary, Inc. v. Harvard Pilgrim Health Care, Inc., 365 F. Supp. 2d 119, 149 n.16 (D. Mass. 2005).

⁶⁴ Loewenstein et al., *supra* note 35, at 141.

⁶⁵ Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 SOC. PSYCHOL. Q. 284, 284 n.2 (2000).

of the individual to society. One of its major principles is that individuals define themselves in part through the groups they interact with in society and the roles they take on—for example, a person may be, at the same time, a spouse, a parent, a teacher, a southerner, a member of the middle class, and a leader.⁶⁶ Each of these categories possesses certain culturally shared meanings and expectations. When people internalize the meanings and expectations associated with these categories, these roles and group memberships are termed “identities,” and become “a set of standards that guide behavior.”⁶⁷

Of course, each person possesses a number of identities, and not all will guide behavior at a given time. A second major part of identity theory is the concept of “salience,” which is defined as the likelihood of a particular identity’s activation.⁶⁸ Thus, “the higher the salience of an identity relative to other identities incorporated into the self, the greater the probability of behavioral choices in accord with the expectations attached to that identity.”⁶⁹ Salience, in turn, is related to commitment—“the degree to which persons’ relationships to others in their networks depend on possessing a particular identity and role.”⁷⁰ Empirical research supports the idea that commitment shapes the salience of an identity, and salience in turn shapes behavior.⁷¹ In one study, for example, researchers found that commitment to role relationships based on a religious identity predicted the salience of the religious identities—so a person with close family, friends, or other significant relationships in a shared religion is likely to have a more salient religious identity than a person with fewer ties.⁷² In turn, the salience of the religious identity predicted the amount of time persons spent in religious activities.⁷³

A. Lawyers’ Identities

Lawyers, like other individuals, possess a salience hierarchy of identities that influence behavior. While few scholars have examined lawyer behavior through the lens of identity theory, one study of corporate

⁶⁶ See Matthew O. Hunt, *Identities and Inequalities: Exploring Links Between Self and Stratification Processes*, in ADVANCES IN IDENTITY THEORY AND RESEARCH 71, 76–77 (Peter J. Burke et al. eds., 2003).

⁶⁷ Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOC. PSYCHOL. Q. 224, 225 (2000) (“In identity theory, the core of an identity is the categorization of the self as an occupant of a role, and the incorporation, into the self, of the meanings and expectations associated with that role and its performance.”).

⁶⁸ *Id.* at 230.

⁶⁹ Stryker & Burke, *supra* note 65, at 286.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

counsel may shed some light on attorney decision making. Hugh and Sally Gunz, professors of organizational behavior and business law, respectively, surveyed several hundred Canadian attorneys who worked in-house as corporate counsel.⁷⁴ The attorneys were asked questions about how long they had worked for the corporation, how involved they were with the corporation's strategic decision making, and whether they were part of the corporation's top management team.⁷⁵ They were also asked to rate their view of their role as a corporate lawyer to establish whether they viewed themselves more as an employee (who also happened to have a law degree) or more as a lawyer (who also happened to be employed by the corporation).⁷⁶ The researchers used this scale as an approximation of identity salience—those lower on the scale were said to have a more salient “professional” identity, and those higher on the scale were said to have a more salient “organizational” identity.⁷⁷

The researchers then examined whether the relative salience of the “organizational” and “professional” identities would affect lawyer behavior.⁷⁸ Specifically, the survey then presented the attorneys with a series of four vignettes, each of which presented a dilemma and required the attorney to assess how he or she would advise the corporate client.⁷⁹ The vignettes were intended not to be leading, but each did have both a generally accepted “professionally correct” course of action and another possible course of action that was more deferential to the organization's leadership.⁸⁰ For example, one vignette was based on actual events occurring at Texaco.⁸¹ The lawyer in the scenario observes senior colleagues at the corporation frequently making racist comments. The lawyer is faced with a choice of options. The first option is to approach the colleagues privately to explain that their comments put the company at risk and suggest to them that they “relax only when they are meeting with colleagues in whom they have great trust.”⁸² The second option is to put

⁷⁴ Hugh Gunz & Sally Gunz, *Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations*, 60 HUM. REL. 851, 859 (2007).

⁷⁵ *Id.* at 864.

⁷⁶ *Id.* (providing a scale of 1 to 5, with 1 being “Lawyer with captive client,” 3 being “Both lawyer with client and employee with law degree,” and 5 being “Employee of organization who happens to have [a] law degree”).

⁷⁷ *See id.* at 855 (defining the two identities as “organizational” and “professional”).

⁷⁸ *Id.* at 874.

⁷⁹ *Id.* at 861–63.

⁸⁰ *Id.* at 874.

⁸¹ *Id.* at 861; *see also* Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1 (discussing an incident involving Texaco board members); Courtland Milloy, *Texaco Taps a Deep Well of Racism*, WASH. POST, Nov. 11, 1996, at B1 (discussing the Texaco incident).

⁸² Gunz & Gunz, *supra* note 74, at 886.

the issue on the agenda for the top management team to discuss and to report the matter to the board of directors if the management team fails to take appropriate action.⁸³

In another vignette, the attorney was told that the corporation's CEO is contracting with a personal friend for corporate services and that the contractor appears to be overcharging for his work.⁸⁴ The attorney is again presented with close-ended options and is asked which is preferable.⁸⁵ In the first option, the attorney will request proposals from other suppliers, bring an alternative proposal to the CEO, and, if necessary, bring it to the board of directors. In the second option, the attorney will still request proposals and bring them to the CEO's attention, but will defer to the CEO's judgment if the CEO decides not to pursue the matter.⁸⁶

Just as identity theory suggests, the researchers did in fact find that the relative salience of the "organizational" and "professional" identities affected reported behavior.⁸⁷ Attorneys who identified more strongly as employees were statistically more likely to choose the more organizationally deferential options in the vignettes, and those who identified more strongly as "lawyers with a captive client" were more likely to choose the more professionally oriented option.⁸⁸ The researchers therefore concluded that the salience of lawyer identity does shape ethical behavior.⁸⁹

The researchers had also hypothesized that the lawyers' commitment to their roles as "employee" and "lawyer" would influence the salience of those identities. Again, the data supported that hypothesis.⁹⁰ The survey results demonstrated a correlation between the amount of time spent on activities that do not require a law degree (such as business planning, management, and administration) and the salience of the "organizational" identity—that is, the more time the attorney spent on business concerns, the more the attorney identified as an "employee" of the corporation rather than as a "lawyer with a captive client."⁹¹

The researchers did not focus on the distinction between lawyer behavior and lawyer judgment. Nevertheless, the survey results suggest that identity salience can affect judgment as well as behavior. The vignettes were phrased to ask not what the attorney *would* do, but what the

⁸³ *Id.*

⁸⁴ *Id.* at 882.

⁸⁵ *Id.* at 883.

⁸⁶ *Id.*

⁸⁷ *Id.* at 871.

⁸⁸ *Id.* at 868, 870–71.

⁸⁹ *Id.* at 870–71.

⁹⁰ *Id.* at 868, 871.

⁹¹ *Id.* at 868, 870–71.

attorney *should* do.⁹² If identity influenced behavior alone, then one might expect that an attorney with a strong “organizational” role would be able to recognize the professionally correct response, but, perhaps fearful of the consequences, would be unable or unwilling to enact it. Such behavior would reinforce the venality hypothesis, noted earlier, which suggests that the lawyers must be somewhat complicit in client misconduct.⁹³ Essentially, such lawyers would suffer not from an ability to see the proper response, but rather from a lack of moral courage in implementing that response.

Interestingly, however, the responses to the vignettes suggest that the problem is not merely one of moral courage—instead, there is evidence that, at least in certain conditions, lawyers truly do not recognize the “professionally correct” course of action. Under the wording of the vignettes, the attorneys were asked to make a judgment call about the correct answer without considering whether they themselves would be capable of taking that action. Because the attorneys’ responses reported differences in judgment (what an attorney “should” do), not just behavior (what the particular attorney “would” do), the study supports the conclusion that lawyer identity can in fact shape lawyer judgment.⁹⁴

B. *Self-Verification: Linking Judgment, Behavior, and Identity*

The Gunz and Gunz study did not examine how lawyers’ identities shaped their answers to the vignettes. Identity theory, however, suggests that a mechanism called “self-verification” ties both behavior and judgment to identity.⁹⁵ Self-verification is the process by which individuals maintain a stable set of identities.⁹⁶ When a particular identity is activated in a given situation, the internalized meanings and expectations associated with the identity act as a standard that the person then compares to his or her “perceptions of meanings within the situation.”⁹⁷ That is, individuals compare their own self-perception to the feedback they get from others. When a person’s situational perceptions match his or her identity standard, self-verification occurs and the person experiences

⁹² *Id.* at 882–86.

⁹³ See *supra* text accompanying notes 4–11.

⁹⁴ Gunz & Gunz, *supra* note 74, at 874.

⁹⁵ Stets & Burke, *supra* note 67, at 232.

⁹⁶ Researchers have found that people are motivated to maintain stable identities, as “people tend to resist changes in their self—both the structure (e.g., current salience hierarchy) and the meanings defining the identities they hold.” Peter J. Burke, *Introduction* to ADVANCES IN IDENTITY THEORY AND RESEARCH 1, 4 (Peter J. Burke et al. eds., 2003).

⁹⁷ Stryker & Burke, *supra* note 65, at 287.

positive emotions.⁹⁸ So, for example, someone who identifies herself as a “good student” will compare this identity to the feedback she gets from others around her. When she receives an “A” on an exam, her internal identity standard matches her perception of how others see her, and she experiences self-verification. Her student identity is reinforced, and she experiences positive emotions.

Identity theory suggests that lawyers with a more salient “organizational” identity are acting to maintain that identity when they choose a course of action in the vignettes. By choosing the course of action associated with organizational deference, those with a more salient “employee/organizational” identity are reaffirming their view of themselves as organizational agents who implement company objectives. Those with a more salient “lawyer/professional” identity similarly reaffirm their view of themselves as advisors to the organizations who provide neutral counsel.

Research in identity theory further suggests that when an identity standard does not match the situational perception (for example, when an “A-level student” receives a “B” on an exam), then negative emotions such as anger, depression, and distress may result.⁹⁹ In such a situation, the person will act to bridge the gap between the situational perception and the identity standard, either by changing the situation (for example, by modifying study habits in an effort to improve grades in the future) or by “seeking and creating new situations in which perceived self-relevant meanings match those of the identity standard” (perhaps by redefining academic success to include being at a certain class rank, rather than defining success by letter grades alone, or perhaps by identifying a particular sphere of success, such as moot court or other academic activities).¹⁰⁰

⁹⁸ See Jan E. Stets, *Justice, Emotion, and Identity Theory*, in *ADVANCES IN IDENTITY THEORY AND RESEARCH* 105, 107 (Peter J. Burke et al. eds., 2003) (discussing the role of emotion in identity theory).

⁹⁹ Stryker & Burke, *supra* note 65, at 288.

¹⁰⁰ *Id.* Recent research in the area of cultural cognition has reached similar conclusions, though approaching the issue from a slightly different perspective. See, e.g., Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 497–98 (2007) (“[I]ndividuals tend to conform their view of the risks of putatively dangerous activities—commerce and technology, guns, abortion—to their cultural evaluations of them. Because individuals’ identities are threatened when they encounter information that challenges beliefs commonly held within their group, the result is political conflict over risk regulation among groups committed to opposing hierarchical and egalitarian, individualistic and communitarian worldviews.”); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *‘Acquaintance Rape’ Cases 3* (Yale Law Sch. Cultural Cognition Project Working Paper No. 29, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437742 (noting that “[p]eople who share formative identities tend to apprehend facts in a similar way in part because they are likely to be drawing on common life experiences when interpreting what various events signify,” and concluding that, “more importantly,” they are also likely to form perceptions of how the world works that match

Self-verification strategies are not always apparent to the individual. Researchers have divided self-verifying strategies as “overt/behavioral” and “covert/cognitive.”¹⁰¹ Overt/behavioral strategies include the choices a person makes consciously—where to work and with whom to interact with.¹⁰² Thus, an attorney whose identity includes a strong commitment to public justice may consciously decide to take a job working for Legal Aid. Covert/cognitive strategies, by contrast, do not involve conscious choice. Instead, they include the cognitive biases described in Part II—both selective attention (“self-verifying information is given attention and processed, and information that is not self-confirming is ignored”) and selective interpretation (“endorsing feedback that fits self-views and denying feedback that does not fit self-views”).¹⁰³

Selective perception and related cognitive biases may offer a way to counteract the existence of non-verifying situational feedback (that is, external feedback that does not match a person’s internal view of themselves). Empirical research has found that “[i]f self-discrepant feedback is unavoidable, people may construct the illusion of self-confirming worlds by ‘seeing’ more support for their self-views than actually exists.”¹⁰⁴ Thus, people with positive self-views will spend more time scrutinizing favorable feedback than unfavorable feedback, and after undergoing an evaluation they will remember more favorable statements than unfavorable statements.¹⁰⁵

People are also more trusting of information that confirms their self-view. Psychologist William Swann notes that “people may nullify discrepant evaluations by selectively dismissing incongruent feedback.”¹⁰⁶ When evaluations are proffered, people “express more confidence” in those evaluators whose conclusions match individuals’ self-conceptions.¹⁰⁷

These unconscious processes have a very real effect on judgment and “may systematically skew people’s perceptions of reality.”¹⁰⁸ When these cognitive processes are invoked, people may “conclude that their social worlds are far more supportive of their self-views than is warranted.”¹⁰⁹ Thus, while the cognitive strategies associated with self-verification may

their appraisals of how it should work in order to avoid dissonance and to protect their status within groups whose members share their core values).

¹⁰¹ Jan E. Stets & Alicia D. Cast, *Resources and Identity Verification from an Identity Theory Perspective*, 50 SOC. PERSP. 517, 522 (2007).

¹⁰² *Id.* at 522.

¹⁰³ *Id.*

¹⁰⁴ William B. Swann, Jr., *The Trouble With Change: Self-Verification and Allegiance to the Self*, 8 PSYCH. SCI. 177, 178 (1997).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

play a beneficial role on an individual level, they do not assist an attorney with the task of providing independent judgment—in fact, they inhibit it.

C. *Self-Verification and Partisanship*

How does self-verification of attorneys' role identities work in practice? Judge John T. Noonan has described one case that exemplifies the factors at work in self-verification of an attorney's role.¹¹⁰ In the 1930s, attorney Hoyt Moore represented Bethlehem Steel Corporation.¹¹¹ When a company that Bethlehem very much wanted to acquire was placed in receivership, Moore bribed a federal judge overseeing the receivership to put Bethlehem in a position where it would be able to acquire the company.¹¹² Moore was not motivated by money; in fact, his compensation was relatively insignificant.¹¹³ Instead, Noonan writes, Moore "identified with the client—an identification easier, rather than harder, when the client was not a single flesh and blood individual, but a corporation, which no one individual encapsulated. For many purposes, Moore was Bethlehem. It became his alter ego."¹¹⁴

Noonan further argues that "[a]t the same time that [Moore] identified with the client, he wanted to prove to its officers, the men with whom he dealt, that he was the master of the situation, that there was nothing his client wanted that he could not bring off."¹¹⁵ Thus, Moore's identity standard defined him as a person with a high level of competence and mastery, one who could accomplish the company's objectives. Acquiring the company desired by Bethlehem allowed him to verify that identity—his success in the venture verified his standing as a titan of industry. The psychological gain from self-verification motivated Moore to bribe a federal judge, even when no significant material gain was present.

Of course, the desire for self-verification does not drive most attorneys to extreme or illegal behavior. But empirical work supports Judge Noonan's intuition that self-verification shapes attorney behavior and judgment, even if not typically to the degree found in Moore's case. The Gunz and Gunz study suggests that attorneys with a more salient organizational identity are more likely to support a course of action desired by corporate management, even when doing so would contravene

¹¹⁰ John T. Noonan, Jr., *The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 834 (2001).

¹¹¹ *Id.* at 835.

¹¹² *See id.* at 837–38 (discussing how Moore oversaw the receivership so that others were discouraged from bidding for the company and the judge approved his own bribe).

¹¹³ *See id.* at 840 ("Moore could have foregone his share of the fee without discomfort. The motivation of this driven man was not money—certainly not money only.").

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 841.

traditional professional obligations.¹¹⁶ Moore was not an employee of Bethlehem, but he nevertheless identified himself as an agent of the corporation who benefited psychologically from the corporation's success. According to identity theory's conception of self-verification, it makes sense that a more salient organizational identity would be linked with higher levels of selective attention to facts and circumstances favorable to the corporation.

There are two possible explanations for why a more salient organizational identity would lead to a selective focus on information favorable to corporate management. First, as Gunz and Gunz noted, a more salient organizational identity is correlated with a larger management role—those attorneys who were more involved in the corporation's leadership structure and more responsible for managerial outcomes were more likely to have salient organizational identities.¹¹⁷ Given the attorneys' management responsibilities, it is likely that verification of their organizational identities required a favorable managerial outcome—when the organization's managers obtained their desired outcome, the organizational identity standard was verified. When managerial goals were met, the attorneys received feedback verifying their success as agents of the corporation.

Second, the organizational identity is, by its nature, more deferential to corporate management than is the professional identity. While the organizational identity requires a favorable managerial outcome, it does not require that the attorney achieve results beyond those desired by corporate management. Thus, when the attorney defers to the CEO on contracting decisions or privately advises management on the dangers of racist comments, the attorney has done enough to obtain positive feedback that reinforces the attorney's identity as a valued employee.

Given the alignment between the organization and the individual attorney, the attorney is predisposed to notice facts and circumstances that support organizational goals. And when events or circumstances are subject to more than one interpretation, the attorney is motivated to interpret them in favor of the corporation. Even when the information is not truly ambiguous, the attorney may be blind to non-supportive facts—in Swann's words, the attorney may be “‘seeing’ more support . . . than

¹¹⁶ Moore's actions also represent what is often termed “ethical fading,” which is the “tendency to interpret the situation so that it does not implicate one's ethical or moral responsibility.” Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 470 (2007).

¹¹⁷ This may have been primarily a function of time spent on professional versus organizational work. See Gunz & Gunz, *supra* note 74, at 874 (“The more a corporate counsel worked as a member of the [top management team], the less time he or she had for professional work, and the more salient his or her organization identity by comparison with his or her professional identity.”).

actually exists.”¹¹⁸

An attorney with a more salient “lawyer” or “professional” identity faces different pressures. On the one hand, there is likely to be less pressure to offer advice that management would find pleasing. While self-verification of the organizational identity requires feedback favorable to the organization’s management, self-verification of the professional identity, by contrast, does not require any particular organizational outcome. As long as the attorney is satisfied that he or she has provided high-quality counsel, the identity standard is verified—whether or not management is actually pleased to receive the advice.

On the other hand, a more salient professional identity may push the attorney to take actions beyond those that would satisfy the attorney with a more salient organizational identity. While the attorney would have less of an interest in pleasing management, he or she would have a greater interest in ensuring that the attorney’s advice was heard by those empowered to make a decision. After all, if the attorney stopped short of offering advice to the highest-level decision makers, he or she would not be fulfilling the expected lawyer role, which includes advising the corporation at the highest level.¹¹⁹ Thus, again, it makes sense that attorneys with a more salient professional identity were more willing to provide advice directly to the board of directors in both the racism vignette and the contracting vignette.

Finally, while the organizational identity is associated with a stronger desire for an outcome favorable to management, the action of cognitive biases may actually prevent a favorable outcome from occurring. In the racism vignette, for example, the attorneys with a more salient organizational identity were more willing to privately advise management to avoid public expressions of racism. These attorneys may have interpreted the situation in the light most favorable to the corporation, assuming that management would indeed curtail the practices and underestimating the probability that they would come to light. In the actual situation on which the vignette was based, the facts did come to light; perhaps unsurprisingly (to anybody not affiliated with the corporation), Texaco then faced a number of lawsuits and saw its stock decline.¹²⁰ Managers who made the statements left the corporation and lost their retirement benefits as punishment.¹²¹

¹¹⁸ Swann, *supra* note 104, at 178.

¹¹⁹ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.13 (2007) (requiring the attorney in these circumstances to “refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law”).

¹²⁰ See Milloy, *supra* note 81.

¹²¹ See *id.*

IV. CASE STUDY—YOO, GOLDSMITH, AND THE TORTURE MEMOS

The Gunz and Gunz study suggests that attorneys' identities are indeed linked to judgment and behavior, just as identity theory suggests. However, the study remained hypothetical. It asked attorneys to identify the correct course of action, but did not study what attorneys in real-life situations actually do when confronted with such ethical dilemmas. Such real-life data would be exceedingly difficult to collect. While it is easy enough to identify ethical dilemmas in hindsight, it is much more difficult to learn what attorneys were thinking as they made their decisions and offered their counsel. Even if attorneys could be surveyed, their confidentiality obligations would generally prohibit them from disclosing information about their representation.¹²² And when ethical dilemmas (and associated corporate scandals) do arise, clients are particularly unlikely to consent to their attorneys' disclosure of their thoughts and strategies, especially if they are facing a threat of litigation.¹²³

The Justice Department's interrogation memos therefore provide an interesting opportunity to examine the connection between attorney identity and judgment in context. The scandal surrounding these memos offers an important perspective on the relationship between identity and judgment. Both the secrecy and the informational problems are minimized, as much of the information about the case has been made publicly available and/or declassified by the government, and both of the major participants in the drama have written books that provide a great deal of insight into their thoughts, motivations, and legal judgment.

A. *Questioning the Memos*

In 2002, John Yoo, a deputy in the Office of Legal Counsel ("OLC"), prepared a memorandum¹²⁴ opining in part that interrogations inflicting pain do not qualify as torture unless the pain rises "to a level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."¹²⁵ Yoo imported a definition of torture from a statute that

¹²² See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007) (providing that "[a] lawyer shall not reveal information relating to the representation of a client," except in certain circumstances, none of which include general data collection).

¹²³ See, e.g., John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 60 n.12 (2005) (stating that an Enron prosecutor "declin[ed] to discuss the role of lawyers in the Enron case" because he "could not adequately address the subject without disclosing confidential nonpublic information").

¹²⁴ Rosen, *supra* note 11 (noting that Yoo has acknowledged drafting the memorandum).

¹²⁵ Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation Under 18 U.S.C. §§2340–2340A* (Aug. 1, 2002), in *THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB* 172, 176 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

authorized benefits for emergency health conditions; the health benefit statute used the phrase “severe pain” as a possible indicator of an emergency condition that might cause serious harm if not immediately treated.¹²⁶

The memo also concluded that “there is [a] significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment,” they nevertheless “fail to rise to the level of torture.”¹²⁷ In addition, it suggested that application of anti-torture laws to the challenged conduct “may be unconstitutional” if the President had authorized the acts under his Commander-in-Chief powers, and it further opined that “necessity or self-defense” could also provide adequate defenses to a potential prosecution for torture.¹²⁸

The 2002 memo was withdrawn two years later by Jack Goldsmith, who had been appointed to lead the OLC.¹²⁹ Goldsmith concluded that the memo was poorly reasoned and represented a failure in legal judgment.¹³⁰ Outsiders generally agreed that the memo, at a minimum, reflected poor lawyering—it was “widely regarded as preposterous,”¹³¹ even “spectacularly bizarre.”¹³² The memo was criticized for defining torture “by lifting language from a Medicare statute on medical emergencies,” “ignor[ing] inconvenient Supreme Court precedents,” and “flatly misrepresent[ing] what sources said.”¹³³ The revised memo omitted Yoo’s narrow definition of torture and abandoned its reliance on the Medicare statute. While Goldsmith conceded that “[i]t is very hard to say in the abstract what the phrase ‘severe pain’ means,” he concluded that Yoo’s “clumsy definitional arbitrage didn’t even seem in the ballpark.”¹³⁴

Goldsmith questioned how Yoo, a good attorney and friend, could have written such a poorly reasoned memo:

How could this have happened? How could OLC have written opinions that, when revealed to the world weeks after the Abu Ghraib scandal broke, made it seem as though the

¹²⁶ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 145 (2007).

¹²⁷ See Memorandum from Jay S. Bybee, *supra* note 125, at 214.

¹²⁸ *Id.*

¹²⁹ Rosen, *supra* note 11.

¹³⁰ GOLDSMITH, *supra* note 126, at 165.

¹³¹ David Luban, *Torture and the Professions*, CRIM. JUST. ETHICS, Summer/Fall 2007, at 2, 59.

¹³² DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 159 (2007); see also W. Bradley Wendel, 2008 *F.W. Wickwire Memorial Lecture: Executive Branch Lawyers in a Time of Terror*, DALHOUSIE L. J. (forthcoming 2009), available at <http://ssrn.com/abstract=1372744> (“In this case, the arguments relied upon by the Bush administration lawyers are so far outside the range of reasonable that it is impossible to take them seriously. That is the basis for concluding that these lawyers acted unethically.”).

¹³³ Luban, *Torture and the Professions*, *supra* note 131, at 59.

¹³⁴ GOLDSMITH, *supra* note 126, at 145.

administration was giving official sanction to torture
 How could its opinions reflect such bad judgment, be so
 poorly reasoned, and have such terrible tone?¹³⁵

Again, the venality hypothesis came into play, as Goldsmith suggested that a combination of a fearful atmosphere and pressure from the White House may have played a role in creating the memo.¹³⁶ But Yoo vehemently disagreed; he staunchly defended the memo's reasoning and denied facing any White House pressure.¹³⁷ The White House, he said, had been "hands off" when it came to drafting the memo, and he stood by its conclusions.¹³⁸ Furthermore, the White House seems to have lacked incentive to pressure Yoo to give the broad interpretation that he offered, given that even the narrower opinion later substituted for the original memo authorized the same interrogation procedures that the White House had inquired about.¹³⁹ Thus, it appears that Yoo's memo had actually given a more deferential opinion than was needed to support the acknowledged interrogation procedures.

While Yoo denies a political motivation in writing the original memo, he sees a political motivation in its withdrawal. Referring to the decision to substitute a revised memo, he states, "Its purpose was to give the White House political cover by making the language more vague, and thus, presumably, more politically correct."¹⁴⁰ Yoo decries the decision to withdraw the memo, asserting that "[i]t harmed our ability to prevent future al-Qaeda attacks by forcing our agents in the field to operate in a vacuum of generalizations."¹⁴¹ He concludes that the focus on "professional responsibility" in providing reliable advice was merely political cover, "a short-term political maneuver in response to political criticism":

[T]he differences in the opinions were for appearances' sake For some new officials at Justice, who came onto the job years after 9/11, withdrawing the 2002 opinion wasn't enough. It was as if, sensing the 2004 opinion's ambivalence

¹³⁵ *Id.* at 165.

¹³⁶ Rosen, *supra* note 11. Others, however, assert that the opinion was designed to provide legal cover to Bush Administration officials. BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 191 (2008) ("[T]he opinion was commissioned specifically to give formal blessing to methods the vice president and war cabinet had authorized in the White House Situation Room.").

¹³⁷ Rosen, *supra* note 11.

¹³⁸ *Id.*

¹³⁹ See Luban, *Torture and the Professions*, *supra* note 131, at 59 (noting that "the changes were merely cosmetic—and, in fact, the substitute memo states in a footnote that all tactics approved under the previous memo are still approved").

¹⁴⁰ JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR viii (2006).

¹⁴¹ *Id.* at viii–ix.

and its decision to muddy the legal waters, these individuals decided they needed to go to extraordinary lengths to discredit the first opinion. They ordered the opening of an investigation . . . to determine whether we had violated our professional responsibilities in providing legal advice.¹⁴²

Why would Yoo and Goldsmith have such radically different judgments about what interrogation procedures are authorized by law? Yoo's memo has been widely criticized, even by those generally sympathetic to the administration.¹⁴³ Goldsmith's views, while still subject to criticism as overly favorable to torture, are generally considered legally reasonable if ill-advised—his views are not considered legally “preposterous,” as were Yoo's.¹⁴⁴ An examination of Yoo's and Goldsmith's books through the lens of identity theory suggests two explanations: a difference in the salience of their political identities and a different commitment to policy making roles in the Bush administration.

B. *Multiple Roles: Policy Making and Providing Legal Advice*

Yoo and Goldsmith played different roles in the Bush administration. Yoo had a significant policy making role in addition to his position as legal counsel. He was a member of the War Council, a “secretive five-person group with enormous influence over the administration's antiterrorism policies.”¹⁴⁵ He was also one of the few Executive Branch representatives at a series of meetings with Congressional leaders that developed legislation authorizing the use of military force against al-Qaeda.¹⁴⁶

Goldsmith, in contrast, focused on law, rather than policy.¹⁴⁷ He acknowledged that he might be asked to opine about matters other than the law, and he was willing to do so: “When appropriate, I put on my counselor's hat and added my two cents about the wisdom of counterterrorism policies.”¹⁴⁸ But ultimately he believed that any policy advice he offered must be subordinate to his role as a legal advisor; he wrote that his job “was not to decide whether these policies were wise. It was to make sure they were implemented lawfully.”¹⁴⁹

Just as the Gunz and Gunz study demonstrated that a greater

¹⁴² *Id.* at 183.

¹⁴³ GOLDSMITH, *supra* note 126, at 165.

¹⁴⁴ Luban, *Torture and the Professions*, *supra* note 131, at 59.

¹⁴⁵ GOLDSMITH, *supra* note 126, at 22.

¹⁴⁶ YOO, *supra* note 140, at 116.

¹⁴⁷ GOLDSMITH, *supra* note 126, at 147.

¹⁴⁸ *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”).

¹⁴⁹ GOLDSMITH, *supra* note 126, at 147.

involvement in management was linked with corporate counsel having a more salient organizational identity, it is likely that Yoo's policy work and greater commitment to a policy making role gave him a more salient "policy maker" identity. Others noticed that Yoo's policy making role and his "close working relationship" with the White House "alienated his Department of Justice boss, John Ashcroft."¹⁵⁰ This alienation prevented Yoo from being promoted into the top OLC job ultimately held by Goldsmith. The alienation may also have weakened Yoo's ties to his role as legal counsel,¹⁵¹ while pushing him even farther into a policy making role.

Thus, it appears that the role identities of "lawyer" and "policy maker" competed against each other to shape—and perhaps distort—Yoo's view of the legal limits of torture. Just as the lawyers who viewed themselves primarily as "employees" in the Gunz and Gunz study were more likely to view the world in accordance with corporate management, Yoo's policy making role likely pushed him to view the situation in line with leaders of the Bush administration.¹⁵² Ironically, this shared perspective may have led Yoo to offer a more aggressive legal opinion than was actually required to meet the administration's legal goals, and the opinion left the administration highly vulnerable to outside criticism.¹⁵³ Goldsmith is critical of the administration's tendency to bring Yoo and other lawyers into the policy making field, writing: "The irony of the lawyer-dominated approach to counterterrorism policy is that the lawyers who didn't do so well at statecraft also ended up not doing so well in the arena of their expertise."¹⁵⁴ It may well be that greater involvement in policy making did in fact cause Yoo and others to lose their independent perspective and to therefore lose their ability to accurately predict how the outside world

¹⁵⁰ *Id.* at 23.

¹⁵¹ Although he was a political appointee, Ashcroft appears to have played more of a "legal/professional" role in the administration, as onlookers note that he "pushed back against the administration's most blatant attempts to circumvent the law." Editorial, *Lawless and Soon Long Gone*, L.A. TIMES, Dec. 24, 2008, at A16.

¹⁵² Tung Yin, *Great Minds Think Alike: The "Torture Memo," Office Of Legal Counsel, and Sharing The Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 502 (2009).

¹⁵³ See *supra* Part III.A. (discussing lawyers' identification of themselves as employees or lawyers).

¹⁵⁴ GOLDSMITH, *supra* note 126, at 34. Interestingly, this criticism parallels an earlier occasion when Bernard Nussbaum, White House Counsel under President Clinton, attempted to resist a DOJ search of Vincent Foster's office after his suicide. Nussbaum resigned after facing "political fallout" from his decision, giving rise to the question, "How could a lawyer as brilliant and accomplished as Bernard Nussbaum make such a calamitous misjudgment?" Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 969–70 (2006). Again, the answer seems to lie in rationalization and self-deception: "The real problem was that he persuaded himself he was right, because his reason told him what ought to be the legal result, and that effort was a massive exercise in self-deception, not because he was wrong about the law, but because he was wrong about the world." *Id.* at 971.

would view their legal opinions.

C. *Salience of Political Identity*

Yoo and Goldsmith also appear to differ in the relative salience of their political identities. On the surface, their political identities share many similarities. Both identify themselves as conservative and Republican, and both worked in the Bush administration. However, deeper examination suggests that a Republican identity was much more salient for Yoo than it was for Goldsmith.

In his book, Goldsmith describes himself as “conservative,” but notes that he “didn’t know any Republican Party politicians” and “had never given money to a Republican campaign.”¹⁵⁵ Goldsmith also states that he “lacked the usual political credentials for the [OLC] job.”¹⁵⁶

When Goldsmith was interviewed for the OLC position, the Deputy White House Counsel questioned why he had once donated to a Democratic friend’s campaign for office, but never donated money to a Republican campaign. Goldsmith responded that “I considered myself conservative and a Republican, but that I had never had much interest in politics, and it had never occurred to me to give money to any campaign until [the friend] had asked.”¹⁵⁷ The fact that it had “never occurred to him” to donate suggests that Goldsmith’s political identity was not particularly high in the salience hierarchy.

Yoo’s political identity, on the other hand, appears to be significantly more salient. He describes attending a pre-9/11 dinner with Ted and Barbara Olson, where they enjoyed talking “about the usual inside-the-Beltway gossip, who was up, who was down, the biggest mistakes, the latest rivalries.”¹⁵⁸ Yoo’s book suggests that his political identity was important to him; he spent time thinking about political intrigue and enjoyed sharing such discussions with his friends.¹⁵⁹ Thus, while Goldsmith may have been a “conservative lawyer,” Yoo on the other hand seems to be a “conservative *cause* lawyer”—that is, he identified deeply and personally with the conservative cause.¹⁶⁰

Goldsmith’s less-salient political identity may have allowed him to be

¹⁵⁵ GOLDSMITH, *supra* note 126, at 20.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 26.

¹⁵⁸ YOO, *supra* note 140, at 90.

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., Ann Southworth, *Professional Identity and Political Commitment Among Lawyers for Conservative Causes*, in THE WORLDS CAUSE LAWYER MAKE 83, 85–86 (Austin Sarat & Stuart Scheingold eds., 2005) (describing a conservative “cause lawyer” as one who identifies deeply and personally with a client’s cause); Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 HASTINGS L.J. 779, 783 (1996) (describing a lawyer committed to the cause of women’s reproductive choice).

more independent than Yoo. Goldsmith noted that others in the administration were sometimes displeased with OLC opinions that offered advice they did not wish to hear.¹⁶¹ But he felt that he was “immune” to their disapproval “because the Senate had confirmed [him], because [he] loved [his] ‘real’ job as an academic, and because [he] had no higher government ambition.”¹⁶²

Thus, Yoo’s political identity may have been more closely tied to his legal opinions than Goldsmith’s was. Yoo’s eagerness to discuss “who was up” and “who was down” in the political establishment suggests that, unlike Goldsmith, Yoo harbored greater political ambitions. And there are other indications that Yoo’s political identity predominated. For example, Yoo criticizes the lawyers who brought legal challenges to military commissions, noting that although they “were only doing their job by providing their clients with the most vigorous defense possible,” such “[l]awyer[ing] is beginning to strangle our government’s ability to fight and win the wars of the twenty-first century”—thus seeming to suggest that traditional lawyering should be subordinate to policies promoting national security.¹⁶³

Viewing Yoo’s and Goldsmith’s behavior through the lens of identity theory suggests an explanation for why the two men who seemed to have so much in common—both conservative, both academics, and both highly accomplished lawyers—could offer their client such radically different legal analyses. Unlike Goldsmith, Yoo played a significant policy role in the Bush administration. His later commentary suggests that his policy role predominated over his legal role. Tellingly, his criticism of the decision to withdraw the August 2002 memo focuses on the policy ramifications (i.e., “harm[ing] our ability to prevent future [al-Qaeda] attacks”) rather than the quality of the legal advice itself.¹⁶⁴ Yoo’s political identity also appeared to be significantly more salient than Goldsmith’s; though both were conservative, Yoo’s political identity was more likely to assert itself in his day-to-day life. Two situational forces pushed Yoo to become closer to his client, the Bush administration. Both his policy making role in the administration and his political identity, shared with other administration insiders, likely caused his judgment to more closely resemble that of other Bush administration officials. Goldsmith, on the other hand, was able to be a more neutral adviser. Thus, it appears that Yoo and Goldsmith’s differing roles and identity structures shaped their

¹⁶¹ GOLDSMITH, *supra* note 126, at 170–71 (stating that David Addington, counsel to the Vice President, and Attorney General Gonzales “did not always acquiesce in OLC opinions that reached uncongenial conclusions”).

¹⁶² *Id.*

¹⁶³ YOO, *supra* note 140, at 209.

¹⁶⁴ *Id.* at viii.

judgment—and hence their advice to the Bush administration—in very different ways.

D. *Legal Advice or Legal Cover?*

The argument that Yoo's political identity rendered his legal advice less-than-independent and therefore fundamentally unreliable presupposes that Yoo's memo was in fact intended to provide legal advice. Commentators have suggested, however, that Yoo's memo may not have been intended to provide neutral advice at all.¹⁶⁵ Instead, they suggest the memo may have been intended to provide "legal cover" to the administration.¹⁶⁶ Perhaps the administration was not actually concerned with the legality of such interrogation methods, but merely wanted to be sure they could mount an "advice of counsel" defense if others sought to hold administration officials legally accountable.

Even if one assumes that the Bush administration was seeking cover, rather than advice, the identity-theory analysis still stands. Providing legal cover is essentially performing an advocacy role in the guise of legal advice. A document that appears to be neutral advice to the client may in fact be written with an entirely different audience in mind. Knowing that the client's decision will ultimately face challenges, the attorney drafts a document that purports to offer legal advice, but is not actually intended to be relied upon by the client—instead, it is intended to persuade later readers that the client reasonably relied on the attorney's advice. In spite of the fact that it appears to be an advisory document, it is actually an advocacy document, much like an opening brief in a contested hearing.¹⁶⁷

But while lawyers' roles in advocacy may be different from their roles as advisors, both roles contain one commonality: the need to accurately gauge how outsiders will react to a given course of action. Just as an advisor needs to predict such reactions in order to advise the client, so too

¹⁶⁵ GELLMAN, *supra* note 136, at 191 ("[T]he opinion was commissioned specifically to give formal blessing to methods the vice president and war cabinet had authorized in the White House Situation Room."). Alberto Gonzales's later statements also suggest that he sees an immunity-conferring aspect to the memos; in a recent interview with National Public Radio, he commented that he did not expect to see torture prosecutions, stating: "These activities . . . they were authorized, they were supported by legal opinions at the Department of Justice." Kate Klonick, *Gonzales: Holder Won't Prosecute Me*, WASH. IND., Jan. 26, 2009, available at <http://washingtonindependent.com/27325/gonzales-holder-wont-prosecute-me>.

¹⁶⁶ See LUBAN, *supra* note 132, at 163 ("Torture is among the most fundamental affronts to human dignity, and hardly anything lawyers might do assaults human dignity more drastically than providing legal cover for torture and degradation.").

¹⁶⁷ This strategy has also been called a "quasi third-party advice," as "lawyers purport to speak disinterestedly in order to influence public conduct or attitudes for the benefit of private clients, and which is given under conditions of nonaccountability and secrecy." William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1557 (2008).

does an advocate need to predict how a decision maker is likely to rule. Just as a litigator cannot know which arguments to emphasize at trial without an idea of how a judge would likely view them, so too government attorneys cannot provide good “legal cover” unless they can accurately predict how persuasive their arguments will be when the challenged conduct comes to light.

For advocates as well as advisors, partisan blindness can be equally debilitating. As noted in Part III, the study participants who represented plaintiffs or defendants tended to overestimate the strength of their case and to underestimate the strength of their opponents’ case. Similarly, Yoo also seems to have overestimated the persuasiveness of his arguments supporting his rather extreme view of executive power. Yoo’s legal analysis, which imported the Medicare statute’s characterization of “medical emergency” to define the meaning of torture, failed to persuade even those most sympathetic to the administration’s goals. In the end, scholars have concluded that it was the values of a “lawyers’ craft” that allowed Goldsmith to “identify the torture memos’ troubling [legal] errors” and to put forward a more legally supportable analysis of interrogation methods.¹⁶⁸ As a result, it appears that Yoo’s more salient organizational identity did not actually serve the Bush administration well; regardless of whether his intent was to provide legal cover or legal advice, Yoo’s counsel ultimately was of little help to his client.

V. SECURING INDEPENDENT LEGAL ADVICE

The lessons learned from the case study of the interrogation memos, combined with the empirical findings from identity theorists, suggest that certain situations are likely to trigger predictable cognitive biases in legal counsel. First, attorneys with multiple role identities such as employee/lawyer or policy maker/lawyer may find that the relative salience of the employee and policy maker identities nudge them to offer more deference to their organization. Second, attorneys with role identities closely aligned to the client’s goals may be subject to the same cognitive distortions suffered by the client, him or herself. Thus, clients may face a conundrum in which the most dedicated attorneys are the worst positioned to offer independent counsel.¹⁶⁹

This section examines some mechanisms for minimizing cognitive biases and enhancing independent counsel. Ultimately, it concludes no single proposal can solve the problems of attorneys’ cognitive biases. Some of the proposals offered—including greater accountability measures

¹⁶⁸ Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1339 (2008).

¹⁶⁹ See, e.g., Gunz & Gunz, *supra* note 74, at 875 (discussing how lawyers that have a greater organizational identity may offer less independent advice).

and increased education—are unlikely to address the more deeply held unconscious biases.¹⁷⁰ Others proposals, such as requiring a more limited role for lawyers, have detriments from the emotional distance of counsel that outweigh the potential benefits of increased neutrality.¹⁷¹

Instead of an overarching solution, this Article suggests that progress will occur only at the margins, and only if clients and attorneys are able to recognize situations where neutrality is particularly at risk. The Article uses insights from identity theory to identify two situations in which the risk of biased judgment is particularly high. The first arises when the attorney occupies another role within an organizational client, such as manager or policy maker, at the same time as he or she is functioning as counsel. The second arises when the client and attorney share common goals that are closely linked to the attorney's role identity—when, for example, the attorney both closely identifies with a particular political party and, at the same time, represents a client whose legal goals overlap with the political party's goals.¹⁷² This second situation is equivalent to the broad definition of “cause lawyering” adopted by a number of scholars.¹⁷³

A. *Traditional Proposals*

Numerous commentators have offered suggestions aimed at reducing cognitive bias, enhancing independent judgment, or both. Some of the

¹⁷⁰ See *infra* Part V.A.; see also Yin, *supra* note 152, at 502 (“[E]thical or professional conduct restraints are not likely to be successful restraints on OLC lawyers, because those lawyers will either not recognize or not agree as to the applicability of the ethical restraints. If anything, presidential administrations that are most in need of having their policy preferences tempered by cautious legal analysis are least likely to get such analysis if they are intent on hiring like-minded lawyers to fill the political positions in OLC.”).

¹⁷¹ See, e.g., Bradley W. Wendel, *Executive Branch Lawyers in a Time of Terror*, DALHOUSIE L.J. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372744 (“Although the distinction between independence and partisanship is a superficially appealing one, it does not stand up very well to analysis. . . . The winner of the presidential election justifiably believes that the election conferred a mandate from voters to pursue a particular political agenda. The President accordingly may select executive branch officials on basis of their fealty to this agenda—not just because it is the President's agenda, but because the content of the agenda has been set by a democratically legitimate process.”).

¹⁷² In this situation, the attorney is attempting to verify two identities: a professional identity in representing the client and a cause-related identity as a political activist. The two roles are likely to overlap and to share common meanings; for example, in a voting-rights case, success in the legal role may equate to success in the political role, and both roles may include a common meaning of “mastery” or “competence.” See, e.g., Peter J. Burke, *Relationships Among Multiple Identities*, in *ADVANCES IN IDENTITY THEORY AND RESEARCH* 195, 201 (Peter J. Burke et al. eds., 2003).

¹⁷³ See, e.g., Southworth, *supra* note 160, at 85 (arguing that the term “cause lawyer” should not be limited to those who primarily focus on empowering disadvantaged groups, but that it can be applied equally to attorneys “engaged in advocacy that challenges prevailing distributions of power and resources,” even if those lawyers are seeking to tip the balance of power in favor of conservative causes).

most commonly proposed solutions include debiasing education¹⁷⁴ and accountability mechanisms.¹⁷⁵ Possible techniques of managing bias, if not eliminating it, include deferring to clients for consent to the potential conflict of interest,¹⁷⁶ enforcing role separation and paternalistically limiting the roles that an attorney may play in a particular matter.¹⁷⁷ However, while these strategies may be appropriate in many situations, this Article argues that they cannot effectively solve the problem of lawyers' cognitive bias and therefore cannot alone solve the problems caused by a lack of independent legal advice.

1. *Creating Accountability Mechanisms*

Some commentators suggest that making lawyers more accountable for their clients' behavior can motivate them to offer more reliable and independent advice.¹⁷⁸ This view tends to give credence to the "venality hypothesis" described in Part I.¹⁷⁹ It assumes that lawyers' willingness to rubber-stamp a client's decision is rationally motivated by an effort to please the client, and it supposes that creating countervailing incentives will likewise motivate attorneys to offer more independent advice.¹⁸⁰

While the venality hypothesis may explain some lapses in lawyer behavior, it does not explain those cases in which lawyers seem to lack any external incentive to give their clients self-serving advice. Clients may sometimes pressure attorneys for favorable results, but client pressure is not an element of every case—after all, clients are not always looking for an attorney just to rubber-stamp desired actions. A rubber-stamp mentality may indeed please some clients, at least in the short term, as such advice may "ma[k]e it easier for them to do things they wanted to do—overstate income on financial statements, underpay taxes, or torture people."¹⁸¹ The long-term consequences, however, are likely to more than offset such

¹⁷⁴ See, e.g., Gunz & Gunz, *supra* note 74, at 876.

¹⁷⁵ See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 508–26 (2002) (summarizing literature on accountability and cognitive biases).

¹⁷⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.7–1.9 (2007) (providing rules regarding conflicts of interest with current clients and duties owed to former clients).

¹⁷⁷ Gunz & Gunz, *supra* note 74, at 876.

¹⁷⁸ See, e.g., Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 471 (2005) (recommending that disciplinary action be taken against the authors of the Yoo/Bybee interrogation memo); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 224 (2003) (recommending various sanctions, including "suits brought by the clients themselves for malpractice committed by attorneys that carelessly allow corporate managers to commit crimes"); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1366–70 (1995).

¹⁷⁹ See *supra* text accompanying notes 4–11.

¹⁸⁰ William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1556 (2008).

¹⁸¹ *Id.* at 1557.

short-term satisfaction. When clients must re-state income, pay back taxes (with penalties), and face unforeseen political and legal consequences for their decisions, they are likely to be highly dissatisfied with their lawyers, especially when they trusted that their lawyers' advice would help them avoid such consequences.¹⁸²

And even if a client is looking for "legal cover" rather than independent legal advice, the client still needs an attorney who can accurately predict how such "cover" will be perceived by outsiders. If the attorney's judgment is so clouded that he or she cannot see how an outsider will react to various legal strategies, then the attorney cannot hope to enact a legal shield in support of the client's actions. Whether the client is seeking independent advice or legal cover, the client's autonomy depends on an attorney with unclouded judgment.

On one level, a client may want to hear that conduct she wants to engage in is legal, since that makes it easier for the client to engage in the desired activity. But the client may face long-term consequences for such illegal conduct. While a client can choose to act illegally, the consequences of illegal conduct should not come as a surprise to the client. Just as a patient can take action that is contrary to medical advice, a client can take action even though it is against the law. But such a decision should not be accompanied by his lawyer's false assurance that the conduct is legal.¹⁸³

Thus, even though clients may be happy to be told that their preferred course of action is legally permissible, they are likely to agree with Walter Dellinger, the former head of the OLC, who concluded that "[y]ou won't be doing your job well, and you won't be serving your client's interest, if you rubber-stamp everything the client wants to do."¹⁸⁴

In addition to overstating clients' desire for self-serving advice, those who support accountability mechanisms as a cure for lawyers' failure to exercise independent judgment also overstate the likelihood that attorneys will properly calculate the incentives offered by such accountability mechanisms. Lawyers who believe firmly (if erroneously) in the advice they give their clients are unlikely to be affected by potential sanctions aimed at curbing disingenuous advice. Research suggests that, at best, there is no clear link between material incentives and the ability to overcome cognitive biases:

[S]ome studies report a negative correlation between

¹⁸² Bruce A. Green, *The Market for Bad Legal Scholarship: William H. Simon's Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1619 (2008) (noting that the "client's preference would be to avoid questions about how it acted and, therefore, to avoid any reason to disclose the lawyer's advice").

¹⁸³ Clark, *supra* note 178, at 467–68.

¹⁸⁴ GOLDSMITH, *supra* note 126, at 38.

financial incentives and the appearance of certain cognitive biases; some studies report no correlation between incentives and the likelihood of subjects' showing a cognitive bias; and some conclude that the effect of the incentive is a function of its size, with cognitive performance improving as the size of the monetary reward increases.¹⁸⁵

When “‘intuition or habit provides an optimal answer and thinking harder makes things worse,’” research suggests that material incentives are likely to be counterproductive.¹⁸⁶ As the next section explains, bias resulting from partisan affiliation with a client resists eradication through additional thought or education, and such attempts may even unwittingly reinforce the bias.¹⁸⁷ As a result, it is unlikely that external accountability mechanisms or material incentives can overcome the judgment-clouding effects of partisan bias.

2. *Debiasing*

Because cognitive biases render accountability mechanisms ineffective, it would be helpful if there were a way to combat these biases. While debiasing strategies can be effective in some cases, they are not likely to be particularly effective at combating attorneys' unconscious partisan biases.

One of the primary debiasing mechanisms is to educate subjects about the existence and effects of common cognitive biases.¹⁸⁸ In theory, it is an attractive option—it seems intuitive that, once informed of the prevalence of cognitive bias, lawyers will be more able to avoid it. But the evidence regarding effectiveness of such education is, at best, mixed. Some studies have found that informing people about the existence of common biases can help controvert the effects of those biases, especially when people are asked to “question their own judgment by explicitly considering counterarguments to their own thinking.”¹⁸⁹ Other studies, however, have suggested that education is actually counterproductive—that it reinforces certain cognitive biases instead of combating them.¹⁹⁰

¹⁸⁵ Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 114–15 (2002).

¹⁸⁶ *Id.* at 118 (quoting Colin F. Camerer & Robin M. Hogarth, *The Effects of Financial Incentives in Experiments: A Review and Capital-Labor-Production Framework*, 19 J. RISK & UNCERTAINTY 7, 34 (1999)).

¹⁸⁷ See *infra* Part V.A.2.

¹⁸⁸ See, e.g., Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 106–07 (2002) (advocating increased education regarding the probability of harm).

¹⁸⁹ Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997).

¹⁹⁰ See Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for its Future*, 51 DUKE L.J. 1397, 1490–91 (2002) (“Indeed, ‘studies show that experience

When attorneys' cognitive biases are deep-seated and unconscious, education is least likely to be effective. This bias blind spot may even cause efforts at maintaining neutrality to backfire, increasing—rather than decreasing—the original partisan commitment. In a follow-up to the roommate study described in Part II,¹⁹¹ researchers attempted to educate some of the participants about the “liking bias” and to ask others to make an extra effort at fairness.¹⁹² The fairness instruction, given to some subjects, stated that “[w]e are interested in determining which age groups can be good mediators of conflict. A good mediator is someone who can be fair, open-minded, and unbiased. Please try to be as fair as possible.”¹⁹³ The bias-awareness instruction, given to other subjects, stated:

Previous research shows that when people learn about a conflict, their responses are heavily influenced by how much they like each of the people involved. We tend to accept the actions of the person we like more than the actions of the person we do not like as much. As you think about the following conflict, please become aware of your natural likes and dislikes, and try not to let them affect your responses.¹⁹⁴

Neither instruction made students any fairer than those given a neutral instruction. The fairness instruction, in fact, backfired and caused the study participants to be significantly more committed to the “more likeable” character.¹⁹⁵ The bias-awareness instruction also had a slight, though not statistically significant, correlation with answers in favor of the more likeable character. Thus, the researchers concluded that while such motivating instructions may make the participants put additional time and effort into thinking about the conflict, they do not change the outcome.¹⁹⁶ Participants believe they are “already being fair.”¹⁹⁷ Thus, participants simply put the extra time and effort into supporting the position they already favored, not on rethinking the position with which they disagreed.¹⁹⁸

Because the partisan bias operates at such a deeply unconscious level, and because people remain unaware of their own partisanship, it is difficult

can *reinforce* cognitive errors' rather than cure them. Nor are these problems easily remedied by information or education.” (quoting Hersh Shefrin & Meir Statman, *Ethics, Fairness and Efficiency in Financial Markets*, FIN. ANALYSTS J., Nov.–Dec. 1993, at 21, 23)).

¹⁹¹ See *supra* Part II.C.

¹⁹² Frantz, *supra* note 54, at 164.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *id.* at 165 (“Giving participants instructions to be fair made them significantly less fair, in favor of the more likable character.”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 166.

¹⁹⁸ *Id.*

to overcome. As one scholar has pointed out, “[b]ecause we perceive ourselves to be objective, we have little reason to think critically about whether our beliefs are, in fact, correct.”¹⁹⁹ As a result, “our biased theories, beliefs, and expectations, tend to persevere.”²⁰⁰

3. *Treating the Potential for Bias as a Conflict of Interest*

Another possibility is to view bias based on partisan affiliation as a conflict of interest between lawyer and client and therefore to handle it through disclosure and consent. Under this model, lawyers would inform their clients that independence may be impaired if (1) the attorney is acting as manager or policy maker in addition to the lawyer role; or (2) the attorney’s representation is motivated in part by a role or group identity shared with the client, such as political affiliation. Once the disclosure is made, the clients could choose whether to consent to the risk that the attorney’s judgment would be impaired by his or her other role obligations.

The consent-and-disclose approach fits in with the regulatory rules on conflicts of interest. Under the *Model Rules of Professional Conduct*, most attorney conflicts of interest are “consentable” if the risks of representation are fully disclosed to the client and the client gives informed consent to them.²⁰¹ A few conflicts, however, are deemed to be so disabling that the lawyer cannot undertake the representation even with consent.²⁰² Other conflicts may present an especially high risk of attorney self-dealing; in such a case, client consent may be allowed only if the lawyer advises the client about the desirability of seeking independent counsel from another attorney,²⁰³ or, in some cases, if the client actually obtains independent counsel.²⁰⁴

Furthermore, the risks posed by partisan attorneys are similar to the risks posed by conflicts of interest more generally.²⁰⁵ Scholars have argued that the conflict of interest doctrine is essentially a structure for determining “how to distinguish risks which are acceptable from those

¹⁹⁹ Benforado & Hanson, *supra* note 59, at 518.

²⁰⁰ *Id.* at 519.

²⁰¹ See MODEL RULES OF PROF’L CONDUCT R. 1.7–1.9 (2007); see also Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the “Mega Firm,”* 18 GEO. J. LEGAL ETHICS 521, 527 n.39 (2005) (“Under U.S. rules, most conflicts are consentable.”).

²⁰² MODEL RULES OF PROF’L CONDUCT R. 1.7 (2007).

²⁰³ See *id.* at R. 1.8(a)(2) (2007) (referring to a lawyer’s business dealings with a client).

²⁰⁴ See *id.* at R. 1.8(h) (2007) (prohibiting a lawyer from contractually limiting malpractice liability unless the client is independently represented in entering the contract).

²⁰⁵ See *id.* at R. 1.7 cmt. 8 (2007) (defining conflicts of interest broadly enough to include cognitive limitations; providing that a conflict of interest exists when “there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests”).

which are unacceptable.”²⁰⁶ By requiring that the risks be disclosed to the client and allowing the client to choose whether to accept those risks, the model “gives the client some choice about the questions of both magnitude and justifiability of the risk she is willing to have her lawyer encounter.”²⁰⁷

But while a disclose-and-consent policy might look appealing in theory, it is problematic in practice. Recent research suggests that such disclosure may have “perverse effects” that lead to a less accurate assessment of the risks than without such disclosure.²⁰⁸ In one study, participants were asked to judge the value of a jar of coins.²⁰⁹ Participants were randomly assigned to be either an estimator, who would provide the official estimate of value, or an advisor, who would assist the estimator with his or her evaluation. Estimators were paid according to the accuracy of their evaluation, but the advisors were paid by how high the estimator’s guess was—thus creating a clear financial incentive for the advisor to offer an inflated assessment. In half of the cases the advisor disclosed this conflict of interest, and in half of the cases the advisor did not.²¹⁰

Under the disclose-and-consent model of conflicts of interest, one would expect to see estimators discounting the advisor’s assessment when the conflict was disclosed, thus compensating for the obvious conflict. In fact, there was no statistically significant change in the estimators’ discounting practices.²¹¹ But what did change significantly was the advisors’ assessments—when they disclosed the conflict, they suggested much higher values to the estimators. Because the estimators failed to discount the biased advice, their guesses were significantly higher when the conflict was disclosed than when it was not disclosed.

The results of this study suggest that clients may not be well equipped to discount a lawyer’s advice when a potential conflict of interest is disclosed. It is not entirely clear why the advisors’ advice changed after disclosure. The researchers offer two possible hypotheses. First, perhaps the advisors expected the estimators to discount their advice once informed of the potential for bias, and they wanted to counteract that effect.²¹² Or perhaps the advisors felt “morally licensed” to pursue their own self-interest once the disclosure was made, as the estimators then had the same

²⁰⁶ Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 877 (1992).

²⁰⁷ *Id.* at 872.

²⁰⁸ See generally Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005).

²⁰⁹ *Id.* at 9.

²¹⁰ *Id.* at 9–10.

²¹¹ *Id.* at 17.

²¹² *Id.* at 6–7; Daylian M. Cain et al., *Coming Clean but Playing Dirtier: The Shortcomings of Disclosure as a Solution to Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 104, 114–15 (Don A. Moore et al. eds., 2005).

information available to them as the advisors.²¹³ Both explanations are plausible, and both suggest that disclosure is not a sufficient remedy for the conflict of interest posed by biased advice. Unless the client is both willing to discount the advice offered by a biased attorney and able to accurately calculate the effect of that bias on the advice offered, disclosure cannot remedy the effects of partisan bias.²¹⁴

4. *Regulating Role Separation*

Given the difficulty of overcoming attorneys' cognitive bias, some commentators have recommended mechanisms to regulate role separation—either by adopting rules that encourage lawyers' independence from clients or by prohibiting lawyers from playing multiple roles within an organization. One commentator, for example, has suggested that law schools socialize young lawyers into professional independence,²¹⁵ that judges use their appointment power to require attorneys to “represent people outside their standard client base,”²¹⁶ and that states apply a “[n]arrow construction of the [conflict of interest] rules”²¹⁷ to create market incentives for lawyers to represent clients outside their typical range.

Others have suggested that lawyers should not play multiple roles within an organization, either by participating in corporate management (in the case of in-house counsel) or serving on the client's board of directors (in the case of outside counsel).²¹⁸ Commentators posit that removing lawyers from management roles allows the attorneys to focus exclusively on providing legal advice and therefore removes much of the temptation to shade their advice “in the direction of what the [top management team] would *like* to hear, rather than what it *should* be hearing.”²¹⁹

Enforcing such role separation may well reduce the role conflicts that inhibit independent judgment. But such a separation entails two significant disadvantages. The first disadvantage is one of knowledge: the more

²¹³ *Id.* at 115–16.

²¹⁴ Of course, even if disclosure and consent will not fully solve the problem of attorney bias, it is still an important tool to protect clients' autonomy and one that is generally required by the rules of professional conduct. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (2007) (requiring disclosure and consent); John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1541 (1998) (noting that disclosure of conflicts protects clients' autonomy interest).

²¹⁵ See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 94 (2003) (“[L]aw teachers can support the service norm It makes a difference in the socialization of young lawyers whether law is taught as an object of identification or as a field of service.”).

²¹⁶ *Id.* at 92.

²¹⁷ *Id.*

²¹⁸ Gunz & Gunz, *supra* note 74, at 875; see also Bernard S. Carrey, *Corporate Lawyer/Corporate Director: A Compromise of Professional Independence*, 67 N.Y. ST. B.J. 6, 6–8 (Nov. 1995) (arguing that attorneys should not serve on a client's board of directors).

²¹⁹ Gunz & Gunz, *supra* note 74, at 875.

removed counsel is from the client, the less information the attorney is likely to have about the subject matter of his or her legal advice. The attorney will not be as well-informed, and therefore her advice simply cannot be as responsive as it would be if, for example, the attorney served on the top management team and possessed the full range of information known to management.

The second disadvantage is one of motivation. Emotional proximity to the client may lead to partisan bias, but emotional distance is not necessarily good for the client either. An old joke illustrates the downside of too much emotional distance between lawyer and client: the client, a criminal defendant, has just lost at trial. ““What happens now?” the horrified client asks.”²²⁰ The attorney replies, ““Well, you go to jail—and I go to lunch.””²²¹

For many lawyers—particularly those who represent clients from a different social stratum than their own—the joke contains a grain of truth.²²² When there is a great deal of emotional distance between lawyer and client, the lawyer is less likely to be troubled by a negative outcome for the client, even when the client faces a potentially traumatic upheaval. The distant relationship allows the lawyer to offer independent—even disinterested—advice, but it does so at the cost of reducing the motivation to push for a positive outcome. For example, a public defender, who represents predominantly economically marginalized criminal defendants, reported that frustration in dealing with his clients made him less likely to offer strategic advice: “I can’t talk to these clients—it’s frustrating and you never really do get through to them. So if they want their jury trial, then OK, I’ll give it to them.”²²³ The lawyer made it clear that he felt more comfortable with other lawyers and judges than he did with his clients: “I prefer to deal with the people of the court—I’d rather talk and argue my case with reasonable people in court, instead of arguing with my clients.”²²⁴

Of course, these are extreme examples from a very specialized practice area. Even with enforced role separation, it is unlikely that corporate and governmental lawyers would become as disconnected from their clients as this public defender was. But even a much-less-extreme version of this disaffection can be disadvantageous to clients who expect their attorneys to fully support their interests.

²²⁰ Paul Allen, *Go! Cinema: Crime Doesn’t Pay for Ashley*, COVENTRY EVENING TELEGRAPH (England), Oct. 25, 2002, at 32.

²²¹ *Id.*

²²² See Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1074 (2003) (discussing how some public defenders allow their clients to set their own strategies and make the key decisions).

²²³ *Id.*

²²⁴ *Id.*

B. *Risk Recognition and Identity Salience*

Ideally, attorneys should offer their clients a balance of zealous advocacy and independent advice. In practice, this balance is hard to achieve. When attorneys are most motivated to zealously represent their clients, a partisan bias may shade and distort their legal advice, rendering it less than reliable.²²⁵ None of the traditional proposals offered to correct this bias fully solve the problem; as discussed above, neither increased accountability mechanisms nor education about cognitive bias are likely to cure the bias blind spot. Nor is requiring disclosure of the potential for bias a sufficient cure, as clients are likely to overestimate their attorneys' ability to compensate for such risks. Finally, mandating role separation may go too far in reducing attorneys' motivation to provide diligent and zealous representation.

But even in the absence of a single overarching solution, there are still methods that attorneys and clients can use to combat the judgment failures arising from partisan bias. This Article draws on social science research to suggest strategies that both lawyers and clients can take to minimize the risk of overly partisan legal advice. First, it offers recommendations for identifying the situations most likely to trigger partisan bias. Second, once such situations are identified, it offers suggestions for minimizing the risks posed by lawyers' partisan identification with clients.

1. *Recognizing Situations Likely to Lead to Partisan Bias*

Identity theory can help identify situations in which attorneys are at high risk of having their judgment colored by partisan bias. Of course, one of the challenges of cognitive biases is that individuals are unaware of them. And the partisan bias is particularly susceptible to such a blind spot, as it operates unconsciously even as individuals perceive themselves to be objective.²²⁶ Thus, it is important to have a way of recognizing when partisan bias is likely to sway attorneys' judgment that does not require the attorneys themselves to be aware of that bias. While identity theory cannot pinpoint such situations precisely, it can provide insight into situations particularly likely to facilitate the partisan bias.

²²⁵ Even attorneys working at large law firms with multiple clients are not immune from partisan identification with their clients. As one commentator notes:

If there is a distance between large-firm lawyers and their corporate clientele over general social and political questions, there is not much disparity between client concerns and the lawyers' agenda for change in the legal fields in which they actually practice. . . . Given an unconstrained power to change the law, the majority [of law-firm lawyers studied] would change the law to suit the interests of their clients.

Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 525 (1985).

²²⁶ See *supra* text accompanying notes 191–200 (discussing a study in which participants are instructed to be as fair as possible, yet they still have the same response).

As discussed above, identity theory suggests that attorneys may be particularly vulnerable to cognitive bias in two situations.²²⁷ The first situation occurs when a separate professional role competes with the traditional lawyer role. Thus, an in-house attorney who is asked to play both a managerial role and a legal role, or a government attorney who possesses both policy making and legal responsibilities may be particularly vulnerable to partisan bias. In this situation, the risk is that the attorney's legal role will be so subordinated to the managerial or policy making role (that is, the professional identity is significantly lower in the salience hierarchy than the organizational identity) that the attorney's judgment is filtered through a managerial/policy lens.²²⁸

In this situation, the attorney is likely to overestimate the strength of his or her employer's position and to underestimate potential liability. Identity theory suggests that this effect is part of the self-verification process, as the attorney seeks to maintain his or her self-conceptions within each of these roles. This self-verification process puts different pressures on the professional identity than on the "manager" or "policy maker" identity. Self-verification of the professional identity does not require any particular outcome for the organization as a whole. As long as the attorney is perceived to offer competent advice, the attorney's internal role standard—how she sees herself (for example, as a competent advisor)—will match her reflected appraisal (she will perceive that others also view her to be a competent advisor). But self-verification of a "manager" or "policy maker" identity requires much more; only if the organization is able to meet its goals will the manager/policy maker also be perceived as successful. While a person may be perceived as a "good lawyer" if she offers sound (though unwanted) advice, that person will not be perceived as a "good manager" if her actions directly thwart the company's goals.²²⁹

When a person filling both lawyer and manager roles is faced with a situation where he or she cannot verify both identities (perhaps because negative legal advice, while sound, would prohibit the company's management from taking desired actions), then the attorney is at risk for developing cognitive biases in favor of management. The attorney would be vulnerable to the "covert" self-verification strategies of selective attention and interpretation, where "self-verifying information is given

²²⁷ See *supra* Part II.

²²⁸ See *supra* Part III.

²²⁹ See Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.* 457, 472 (2000) (reporting research findings: "Inside counsel, like their business peers, are under intense pressure to meet business objectives. The lawyers working in these conditions are, like the business professionals with whom they work, held responsible for the bottom line of their division" and noting one attorney's conclusion that "bottom line results are really what make or break [a career] . . . the bottom line—success—is how everybody is judged.").

attention and processed, and information that is not self-confirming is ignored,” and individuals “endors[e] feedback that fits self-views and deny[] feedback that does not fit self-views.”²³⁰ By unconsciously ignoring unfavorable information, the attorney is able to offer legal advice favorable to management without violating his or her self-perception of competent lawyering.

The second situation posing a high risk of cognitive bias occurs when a role identity high in the lawyer’s salience hierarchy (such as Yoo’s identity as a conservative activist) corresponds with the client’s goal. In Yoo’s case, for example, his conservative political identity aligned closely with the Bush administration’s goals—but it also left him subject to the same blind spots, unable to see how others would view his legal opinions as overreaching and unsupported.

This situation of alignment between lawyer identity and client goal may be functionally the same as “cause lawyering,” which is often defined by a “deep identification with and commitment to” a cause, such that the lawyer specifically seeks out clients whose legal needs align with that cause.²³¹ Attorneys who view themselves as “cause lawyers” and share common goals with their clients may similarly share blind spots with them.²³² Again, identity theory suggests that the self-verification mechanism comes into play. The cause lawyer’s more salient identity is, for example, “conservative activist,” “civil liberties activist,” or “poverty lawyer.” Self-verification of such an identity requires success in moving the cause forward. Just as the lawyer/manager had an unconscious incentive to view the facts in favor of corporate management, the cause lawyer has an unconscious incentive to view the facts in the light most favorable to the cause. To the extent that the client shares the same commitment to the cause, the lawyer’s cognitive biases are likely to mirror the client’s, as seemed to happen with Yoo. These biases render the lawyer unable to either offer neutral advice or to accurately predict how decision makers will respond to various avenues of advocacy.

²³⁰ Stets & Cast, *supra* note 101, at 522.

²³¹ See McMunigal, *supra* note 160, at 783 (describing Sarah Weddington, the lawyer who won *Roe v. Wade* and remained committed to the causes of women’s rights and reproductive choice); see also Southworth, *supra* note 160, at 85 (arguing that the term “cause lawyer” should not be limited to those who primarily focus on empowering disadvantaged groups, but that it can be applied equally to attorneys “engaged in advocacy that challenges prevailing distributions of power and resources,” even if those lawyers seek to tip the balance of power in favor of conservative causes).

²³² See Patrick J. Bumatay, *Causes, Commitments, and Counsels: A Study of Political and Professional Obligations Among Bush Administration Lawyers*, 31 J. LEGAL PROF. 1, 8–9 (“[A] distinct quality of cause lawyering is the elevation of political or moral commitments above the client Cause lawyers still engage in client service, but, significantly, they view that work as a ‘means to their moral and political ends.’ Accordingly, they seek clients with whom they agree or whose positions may advance their own cause.” (quoting STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 7 (2004))).

If the client is less committed to the cause than the lawyer, then the lawyer may simply favor the cause over the client's individualized interests. For example, in *Roe v. Wade*, attorney Sarah Weddington viewed the case as "one facet of a collective effort to expand women's reproductive rights."²³³ Her client, however, was primarily "interested in terminating the pregnancy that was the source of her current dilemma," and was "neither politically aware nor committed."²³⁴ At the outset of the case, Weddington made a strategic choice not to pursue a narrow argument that the Texas abortion statute should have a rape exception, but chose instead to focus on the broader issue of the statute's constitutionality as a whole. It was not clear, at the time she made the decision, which strategy would be more likely to succeed for her client.²³⁵

Assuming Weddington even considered an argument based on a rape exception, she may have been predisposed to underestimate its likelihood of success; prevailing on that exception would not help the larger cause. Critics of cause lawyering suggest that even in the absence of cognitive bias, partisan affiliation with a cause may push a lawyer to seek results that do not serve the client's individual legal needs.²³⁶ When the lawyer's affiliation with the cause also prompts partisan bias, this effect is magnified. In that case, the lawyer's unconscious bias influences him or her to view the legal situation in the light most favorable to the cause, and the lawyer may therefore overlook non-cause-related strategies that would benefit the individual client. Not only does the lawyer push for a positive cause-related outcome, but she may not even recognize the strengths of alternative legal strategies.

2. *The Situational Effect on Identity Salience*

The prior subsection argued that identity theory can help identify particular situations in which attorneys are likely to be particularly susceptible to partisan bias, and it distinguished two particular high-risk situations: (1) those in which the attorney plays more than one professional role in an organization; and (2) those in which the attorney is motivated by a deep commitment to, and identification with, a social cause beyond the case itself. In both situations, the attorney's legal judgment is affected when the "professional" identity is subordinate to the competing identity—a "manager," "policy maker," or "employee" identity in the first instance, and a cause-related role identity such as "conservative activist" in the

²³³ See McMunigal, *supra* note 160, at 784.

²³⁴ *Id.* at 790.

²³⁵ *Id.* at 793.

²³⁶ Note, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 HARV. L. REV. 1510, 1511 (2006) ("[T]raditionalists accuse cause lawyers of being 'double agents' who, by sacrificing the interests of their clients to those of some favored collective, treat their clients as means to their own ends.").

second instance. This Article has argued that when one of these competing identities is more salient than the professional identity, the attorney is more likely to unconsciously engage in selective attention, selective perception, and related biases in an effort to verify that identity. By contrast, when the professional identity is more salient, the attorney is more likely to offer neutral advice and better able to predict how outside decision makers will evaluate a legal question. In the absence of an overarching solution to eliminate the larger problem of potential bias and conflict of interest, the question then becomes whether there are nevertheless steps that can be taken at the margin to facilitate a more salient professional identity. This Article argues that there are indeed such steps.

In recent years, both social scientists and legal scholars have begun to focus on the power of situational influences, finding that “seemingly small features of social situations can have massive effects on people’s behavior” across a variety of contexts.²³⁷ There is no reason that attorney judgment should be different. This Article therefore posits a model of situational influence—that situations can act in conjunction with lawyers’ identity structures to “transform the ease or difficulty of certain courses of action.”²³⁸ Although an individual lawyer’s identity structure may cause him or her to be particularly susceptible to particular cognitive biases in the scenarios identified above, small changes in situation can increase the attorney’s reliance on his or her professional identity, rather than an organizational or cause-related identity, when a client needs more neutral legal advice.

First, research suggests that attorneys can take steps to raise the salience of the professional identity, increasing the probability that the professional identity will be activated in a particular situation. Both the time spent in the role and the connections maintained in that role are correlated with the salience of the role identity.²³⁹ So an attorney who spends more time focused on providing legal advice (rather than management of policy making) is likely to have a more salient professional identity. Similarly, if the attorney connects to other individuals who share that identity, it will also be more salient—so, for example, a reproductive-rights attorney who wants to avoid falling prey to unconscious bias could spend time in a group based on participants’ shared profession (for example, a local bar association group) rather than solely spending time in groups with a shared social cause. By increasing the time spent connecting with other people over more general professional concerns, the attorney would likely find that her professional identity rises in salience as

²³⁷ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 252 (2008).

²³⁸ David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 297 (2003).

²³⁹ See Gunz & Gunz, *supra* note 74, at 874.

compared to her cause identity.²⁴⁰ The attorney would remain no less committed to the cause of reproductive rights, but the increased salience of her professional identity would make it more accessible when she is asked to make a legal judgment.

Even a modest increase in the salience of the attorney's professional identity may have a significant impact on the attorney's legal judgment in practice. Recent research has looked at the impact of the strength and salience of both a "worker" identity and "moral" identity on the decision to cheat in a laboratory study.²⁴¹ The researchers found that each of these identities influenced participants' propensity to cheat in opposite directions—for every unit increase in the worker identity, odds of cheating increased ninety-six percent, but for every unit increase in the moral identity, the odds of cheating decreased by sixty percent.²⁴² A unit change in the worker identity had a greater impact on the outcome than did a unit change in the moral identity. Thus, the researchers concluded that both identities were operative in the situation, but that the worker identity was more salient than the moral identity.²⁴³

It seems likely that the same effect may occur when lawyers' competing identities are both activated—both the organizational identity and the professional identity may be activated when in-house counsel is asked for legal advice, for example. When the attorney's advice is unconsciously biased in favor of the organization, then the attorney's organizational identity ends up influencing the advice more than his or her professional identity. If so, then increasing the salience of the professional identity should also increase its ultimate influence on the attorney's judgment and presumably decrease the incidence of biased advice.

As noted above, the strategies of increasing time and commitment to a professional identity increase the identity's overall salience within the attorney's hierarchy of identities. But there are also strategies that can further increase salience situationally; research suggests that "the identity hierarchy gets slightly re-ordered within a situation as the situation triggers the salience of some identities over others."²⁴⁴ This research suggests that an identity can be "primed" through reflection to achieve increased

²⁴⁰ Ideally, such activities would include interaction with attorneys who possess different perspectives, and at a minimum, it should include interaction with attorneys outside the particular legal team. Interaction solely with co-workers is much less likely to promote critical thinking. See Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 461 (2007) ("Unanimity also encourages conformity, and unanimity is common among lawyers who are working together on the same legal matter.").

²⁴¹ See generally Jan E. Stets et al., *Moral Agency and Emotions: A Control Systems Approach* (2008) (unpublished manuscript, on file with the author).

²⁴² *Id.* at 32.

²⁴³ *Id.*

²⁴⁴ *Id.* at 32–33.

salience in a given situation, making it more likely that the identity will be activated in a given situation.²⁴⁵ For example, writing and describing the words “caring,” “compassionate,” “kind,” and related terms worked to prime a moral identity.²⁴⁶ Study participants in the primed condition were more likely to report negative emotions after reading a news story about the mistreatment of Iraqi prisoners and were less likely to express moral disengagement.²⁴⁷

There are a number of ways that an attorney could prime a professional identity. Again, interacting with others in a professional capacity may have such an effect—sharing professional expectations and discussing the legal ramifications of a particular issue may increase its salience relative to an organizational or cause-related identity.²⁴⁸ Even if privilege concerns or other issues precluded discussing the case with others, the attorney could still individually reflect on issues of independence and neutrality.

One type of personal reflection, which David Luban has termed “Socratic Skepticism,” may be especially helpful at combating the cognitive biases caused by the subordination of a lawyer’s professional identity. Luban describes the skepticism as taking “a stance of perpetual doubt toward one’s own pretensions as well as the pretensions of others . . . by trying to make a habit of doubting one’s own righteousness, of questioning one’s own moral beliefs, of scrutinizing one’s own behavior.”²⁴⁹ Attorneys with strong organizational or cause-related identities are especially likely to benefit from taking a skeptical approach to their own legal advice, and to focus their skepticism particularly on issues of independence and neutrality. The very process of reflecting on these values may act to prime the attorney’s professional identity and thus increase its salience in the decision making process.²⁵⁰

Finally, strategies to increase the situational salience of an attorney’s

²⁴⁵ Karl Aquino et al., *A Grotesque and Dark Beauty: How Moral Identity and Mechanisms of Moral Disengagement Influence Cognitive and Emotional Reactions to War*, 43 J. EXPERIMENTAL SOC. PSYCH. 385, 386 (2007).

²⁴⁶ *Id.* at 390.

²⁴⁷ *Id.*

²⁴⁸ See Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 1020 (2006) (“When I am faced with a difficult choice, I fear nothing like my ability to persuade myself. . . . Whether in our own minds, or in a group of like-minded executives, we are wholly capable of mistaking what makes us happy or fulfilled with what is right. And, the only check on the power of reason, and its thirst for rationality that produces lies, is openness to the insight and reality, however uncomfortable or distasteful or opposed to our own reasoned conclusions, that come from another.”).

²⁴⁹ Luban, *Integrity*, *supra* note 238, at 310.

²⁵⁰ Others have also recommended that lawyers consciously reflect on the decision making process itself. See, e.g., Jeffrey M. Lipshaw, *Models and Games: The Difference Between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613, 616 (2008) (“Practicing lawyers (or law professors) need to think about *thinking itself* or face the possibility of being misled by precisely the same context facing their clients.”).

professional identity may incorporate elements of some of the traditional proposals discussed above, such as accountability mechanisms, education, disclosure and consent, or role separation. While none of the proposals appears to fully solve the problem of attorney bias, elements of those proposals may nevertheless be valuable for activating an attorney's professional identity, especially to the extent that they encourage the attorney to focus on the particular aspects of independence and neutrality that may be lacking when the attorney's organization or cause-related identity is more salient. A legal team might therefore adopt an accountability device of evaluating attorneys specifically on measures of neutrality and independence—performed either by a managing attorney or through peer evaluations. The very mention of these factors in the evaluation may act to prime the attorney's professional identity.

VI. CONCLUSION

When onlookers ask, “Where were the lawyers?” after a high-profile corporate or governmental scandal in which there were “red flags waving all over the place,”²⁵¹ the answer may be that the lawyers' partisan affiliation with their client blinded them to those flags. Relying on an identity-theory explanation of lawyer behavior, this Article argues that attorneys may be particularly susceptible to such a partisan bias in two situations: first, where the lawyer performs a policy making or managerial role in the client's organization in addition to providing legal services, and second, where the attorney is motivated by a deep commitment to, and identification with, a social cause beyond the case itself. In both of these cases, the lawyer's professional identity is at risk of being subordinated to an organizational or cause-related identity, and in such a case, the lawyer's judgment is less likely to be neutral or independent.

These situations present a conundrum for the client: the very factors that motivate the attorney to provide zealous, committed representation also inhibit the attorney's ability to offer unbiased, independent advice. Because traditional proposals for eliminating or managing bias appear unlikely to provide a comprehensive solution to the cognitive biases that arise from attorneys' partisan affiliation with clients, this Article recommends a more modest approach to increase the salience of lawyers' professional identities and to minimize the biases that result from subordination of that identity. Increasing the time spent participating in professional activities and increasing the number of connections to others with a similar professional identity may help to increase the salience of that identity. Similarly, reflecting on the need for neutrality and independence may also activate the lawyer's professional identity in a given situation.

²⁵¹ See *Hewlett-Packard's Pretexting Scandal*, *supra* note 2.

While these are small changes and not overarching solutions, even a small change in identity salience can influence the attorney's legal judgment at the margin in close calls.